83-218

No.....

In The
Supreme Court of the United States
October Term, 1983

AMOS REED, etc., and the
ATTORNEY GENERAL OF THE
STATE OF NORTH CAROLINA,

Petitioner,

vs.

DANIEL ROSS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Attorneys for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Whether the Fourth Circuit has disregarded the plain language of *Engle v. Isaac*, 456 U. S. 107 (1982) by holding the novelty of Mr. Ross' claim constitutes cause for the purpose of excusing a forfeiture when this Court has already indicated that claim was not novel at the time of Mr. Ross' trial.

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DANIEL ROSS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Amos Reed and the Attorney General of the State of North Carolina, pray that a writ of certiorari will issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Ross v. Reed*, 704 F. 2d 705 (4th Cir. 1983), rehearing denied May 4, 1983, reversing *Ross v. Reed*, No. 78-62-HC, unpublished (EDNC, October 23, 1980).

OPINION BELOW

The opinion of the United States Court of Appeals is reported as set out above and a copy of it is attached as Appendix A to this petition (App. 1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) within ninety days of the denial of the petition to rehear, May 4, 1983, a copy of which is attached as Appendix B to this petition (App. 10).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law."

STATEMENT OF CASE

Daniel Ross was tried in Wake County, North Carolina Superior Court during March 1969 for the murder of his wife and was convicted of first degree murder in a trial in which the burden of proof was placed on him to

prove self-defense and to disprove an inference of malice and unlawfulness arising from his use of a deadly weapon. In 1977, he unsuccessfully attacked his conviction in state court on this ground and in early 1978 filed this action which was held in abeyance by the District Court pending resolution of Circuit Court cases which might influence its outcome. The District Court ultimately ruled against petitioner in October of 1980 and the Fourth Circuit affirmed in case number 80-8344, unpublished, filed April 1, 1981. Certiorari was then sought from this Honorable Court, No. 80-6701 and this was allowed on April 19, 1982 with the Fourth Circuit's decision being vacated for reexamination in light of *Engle v. Isaac, supra.* This order is attached as Appendix C to this petition (App. 11). After briefing and argument, decision was rendered for petitioner and rehearing was denied as noted above.

STATEMENT OF FACTS

Petitioner was convicted in a trial in which the instructions arguably violated the later decision in *Mullaney v. Wilbur,* 421 U. S. 684 (1975), as they placed the burden of proof on petitioner to rebut a presumption of malice and unlawfulness and to prove self-defense. He did not object to this at trial but under state law he was not required to in order to preserve review of the instructions on appeal. He did not assign the instructions as error on appeal either, however, and this forfeited his only state remedy which the Fourth Circuit in *Cole v. Stevenson,* 620 F. 2d 1055 (4th Cir., 1980) held also barred relief in

federal habeas proceedings. However, due to the remand of the case to the Fourth Circuit for reconsideration in light of *Engle v. Isaac, supra,* the Fourth Circuit, in looking at the time of petitioner's trial, found that the issues were novel; that this was cause for relief from forfeiture; that the state had conceded prejudice existed; and that the instruction complained of did violate the *Mullaney* decision.

REASONS FOR GRANTING THE WRIT

I.

The writ should be granted because the Fourth Circuit has disregarded the plain language of this Court in Engle v. Isaac, supra.

The reason the writ should issue is that the Fourth Circuit either has disregarded the plain language of this Court's decision in *Engle v. Issac, supra,* or that language, despite its apparent clarity, is not clear to the Circuits and needs rewording.

In *Engle,* this Court said:

> We need not decide whether the novelty of a constitutional claim ever establishes cause for failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceeding in the hope that some aspect might mask a latent constitutional claim. *Id.* at 131.

This language has engendered three decisions in the Circuits that the novelty of a claim will constitute cause to excuse forfeiture under *Wainwright v. Sykes,* 433 U. S. 72 (1977)—petitioner's case, *Sullivan v. Wainwright,* 695

F. 2d 1306 (5th Cir. 1982) and *Meyers v. Washington*, — F. 2d —, 33 Cr. L. 2080 (9th Cir., April 27, 1983). However correct this interpretation of *Engle* may be, it is inapplicable to Mr. Ross' case.

Mr. Ross was tried in March 1969 and his appeal was final on October 15, 1969. While *In re Winship*, 397 U. S. 358 (1978) was not decided until five months after this, footnote 39 of *Engle* notes that petitioner's claim was not a novel one by 1969:

> Even before *Winship*, criminal defendants and courts perceived that placing a burden of proof on the defendant may violate due process. For example, in *Stump v. Bennett*, 398 F. 2d 111, *cert. denied*, 393 U. S. 1001 (1968), the Eighth Circuit ruled *en banc* that an Iowa rule requiring defendants to prove alibis by a preponderance of the evidence violated due process. The court, moreover, observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law" 398 F. 2d 122. See also *Johnson v. Bennett*, 393 U. S. 253 (1968) (vacating and remanding a lower court decision for reconsideration in light of *Stump*); *State v. Nales*, 28 Conn. Supp. 28, 248 A. 2d 242 (1968) holding that due process forbids requiring defendant to prove "lawful excuse" for possession of house breaking tools). *Id.* at 131, 132.

The Fourth Circuit, in not following Footnote 39, has set its District Courts adrift to make unguided, subjective determinations of how many cases and how many prior years are necessary for novelty to wear off. That is a poor approach and one this Honorable Court should remedy.[1]

---

[1]The State has complied with the decision of the Fourth Circuit by releasing petitioner and recognizes that some au-

(Continued on next page)

CONCLUSION

It is respectfully argued that because of the above, a writ of certiorari should issue to summarily reverse the Court of Appeals. Submitted as the petition for writ of certiorari on behalf of Amos Reed and the Attorney General of the State of North Carolina, this 27th day of July, 1983.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

RICHARD N. LEAGUE
Special Deputy Attorney General

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(919) 733-2011

(Continued from previous page)

thority holds this would preclude appellate review, 4 CJS *Appeal and Error*, Sec. 214, (1955). However, at the time of the decision, Mr. Ross was on work release, in a custody status which allowed week-end home leaves, and was a likely candidate for parole this summer. Therefore, the State's interest in restricting his freedom during the pendency of this petition was minimal, and, of course, it was financially favorable to the State to release him. Under these circumstances, the State feels that its compliance should not bar action by this Honorable Court.

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 82-6537

Daniel Ross,

Appellant,

vs.

Amos Reed, etc., and Attorney General of the State of North Carolina,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
F. T. Dupree, Jr., District Judge.

Argued December 6, 1982 Decided March 31, 1983

Before WINTER, Chief Judge, ERVIN, Circuit Judge and HAYNSWORTH, Senior Circuit Judge

---

Barry Nakell, School of Law, University of North Carolina, for Appellant; Richard N. League, Special Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on Brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

Because he had not presented his federal claims to the Supreme Court of North Carolina in the course of his direct appeal from his conviction of first degree murder,

we summarily affirmed a denial of habeas corpus relief to this North Carolina prisoner under the principle of *Cole v. Stevenson*, 620 F. 2d 1055 (4th Cir.) *en banc, cert. denied*, 449 U. S. 1004 (1980). Thereafter, the Supreme Court vacated our judgment and remanded the case for reconsideration in light of the intervening cases of *Engle v. Isaac*, 50 U. S. L. W. 4376 (1982), and *United States v. Frady*, 50 U. S. L. W. 4388 (1982). *Ross v. Reed*, 102 S. Ct. 1063 (1982). We conclude that the cause and prejudice exception to the state procedural bar rule is present, requiring us to go to the merits of the claim. On the merits the prisoner is entitled to relief.

I.

In March 1969 Ross was convicted of first degree murder in the slaying of his wife. There was some evidence that Ross had suffered a stab wound in the back of his neck, and Ross testified that his wife was armed with a knife, though that was contradicted by other witnesses. He claimed lack of malice, which would affect the degree of the offense, and sought complete exoneration on a claim of self-defense. In accordance with settled state law at the time, the trial judge instructed the jury that Ross had the burden of proving each of those defenses. The Supreme Court of North Carolina affirmed the conviction on October 15, 1969. *State v. Ross*, 275 N. C. 550, 169 S. E. 2d 875 (1969).

More than five months after the decision of the North Carolina Supreme Court in *State v. Ross*, the Supreme Court of the United States decided *In re Winship*, 397 U. S. 358 (1970). There it held that due process requires the prosecution to prove beyond a reasonable doubt every

element of the offense charged. Later it was to decide *Mullaney v. Wilbur*, 421 U. S. 684 (1975), in which it specifically held that in a murder case the burden is on the prosecution to prove beyond a reasonable doubt the absence of heat of passion or sudden provocation. In *Hankerson v. North Carolina*, 432 U. S. 233 (1977), the *Mullaney* holding was held to have retroactive application.

Relying upon *Mullaney* and *Hankerson*, Ross unsuccessfully sought post-conviction relief in North Carolina's courts. He then filed in the district court a petition for a federal writ of habeas corpus. The district court held this case pending final conclusion of the litigation in *Cole v. Stevenson*. In *Cole*, this court held in its six to three *en banc* decision that North Carolina's rule which barred post-conviction consideration of his federal claims respecting the burden of persuasion placed upon him by the trial judge's instructions also barred our consideration of those claims upon a petition for a federal writ of habeas corpus. 620 F. 2d 1055 (1980). The Supreme Court denied a writ of certiorari in *Cole* with three justices noting their dissent. 449 U. S. 1004. The district judge then denied the Ross petition on the basis of the procedural bar, and we affirmed.

As indicated at the outset, the Supreme Court then vacated our judgment and remanded the case for reconsideration of the cause and prejudice exception to the rule of procedural bar as enunciated in *Engle v. Isaac* and *United States v. Frady*.

II.

Ross has advanced two preliminary or alternative arguments.

First, he invites us to overrule or depart from the *en banc* decision of this court in *Cole v. Stevenson*. This panel of the court is bound by the *en banc* decision in *Cole* unless it is later supplanted by an *en banc* decision by this court or by a subsequent decision of the United States Supreme Court. It is true that in *Engle v. Isaac* the Supreme Court spoke of a state's interest in discouraging procedural defaults during trial proceedings, but a state has equivalent interests in discouraging procedural defaults during appellate proceedings. There is nothing in any decision of the Supreme Court subsequent to our *en banc* decision in *Cole* which would warrant this panel's now concluding that *Wainwright v. Sykes*, 434 U. S. 72 (1977) should be confined to defaults occurring during trial proceedings.

Ross also contends that the rule of bar was waived by the North Carolina Supreme Court when it noticed the trial judge's instructions regarding the burden of proof during its opinion disposing of the direct appeal. The claim of waiver is not without some support, but we find it unnecessary to delve behind the rather elusive language of the opinion in an attempt to determine precisely what was in the minds of the justices of the North Carolina Supreme Court when they wrote.

III.

This case falls within the "cause and prejudice" exception as applied by the Supreme Court in *Engle* and *Frady*.

The state concedes that the prejudice prong is satisfied. Unlike the situation in *Frady*, there was testimony in this case that Ross reacted to an attack on him by his estranged wife. According to his testimony, she approached him from the rear and stabbed him in the back of the neck, whereupon he whirled and fired two shots into the body of his knife-brandishing assailant. If the jury thought his defensive reaction to the attack upon him excessive, it well could have found him guilty only of manslaughter rather than first degree murder. There was some corroboration of Ross' testimony about the wound he suffered, so there is no room for speculation by us that the jury was so persuaded by the prosecution witnesses that no one of them entertained any doubt about their version of the event. Under these circumstances, the allocation of the burden of persuasion to Ross may well have influenced the jury in reaching a verdict of guilty of murder in the first degree.

We also conclude that there was cause for not having raised the claim.

In *Engle v. Isaac*, the Supreme Court left open the question whether novelty of the constitutional claim might ever constitute cause for not raising it, though it expressed its hesitance "to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." 50 U. S. L. W. at 4383. It found no cause for the failure to object in the three consolidated cases before it, because the constitutional claims of the three respondents "were far from unknown at the time of their trials."

The three respondents in *Engle* had been convicted of murder in separate trials in Ohio. Each had failed to object to an instruction placing the burden of persuasion of lack of malice upon him, and cause was asserted to lie in the fact that trial counsel in each case thought there was no constitutional basis for an objection to that allocation of the burden of persuasion. The Supreme Court rejected that assertion because each of the trials had occurred more than four years after its decision in *In re Winship*, 397 U. S. 358 (1970), in which, in a different context, it was held that due process required the prosecution to prove every element of the offense beyond a reasonable doubt. The Supreme Court referred to a number of cases decided by other courts in the interim specifically supporting the constitutional claims of the *Engle* respondents. It concluded that trial counsel's lack of awareness of those recent developments in the law did not constitute cause for a failure to object.

Before us is the question left undecided by the Supreme Court in *Engle*, for Ross was tried and his conviction was affirmed before the Supreme Court's decision in *In re Winship*. Trial counsel did not have the benefit of that springboard from which to launch a constitutionally based objection to the charge and, on appeal, a claim of entitlement to a new trial.

The state contends that *Winship* was not the seminal decision in this area. It relies upon Footnote 39 in *Engle:*

> Even before *Winship*, criminal defendants and courts perceived that placing a burden of proof on the defendant may violate due process. For example, in *Stump v. Bennett*, 398 F. 2d 111 (CA 8), cert. denied, 393 U. S. 1001 (1968), the Eighth Circuit ruled en

banc that an Iowa rule requiring defendants to prove alibis by a preponderance of the evidence violated due process. The court, moreover, observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law." Id., at 122. See also *Johnson v. Bennett*, 393 U. S. 253 (1968) (vacating and remanding lower court decision for reconsideration in light of *Stump*); *State v. Nales*, 28 Conn. Supp. 28, 248 A. 2d 242 (1968) (holding that due process forbids requiring defendant to prove "lawful excuse" for possession of house breaking tools).

50 U. S. L. W. at 4382.

It is rare that a major decision, breaking with precedent, is not foreshadowed by straws in the wind. A hint here and there voiced in other contexts is not the explication of a broad principle offering a reasonable basis for a challenge to frequently approved jury instructions which had been used in North Carolina, and many other states, for over a century. *See State v. Hankerson*, 288 N. C. 632, 220 S. E. 2d 575.

The Supreme Court in *Engle* was concerned with the consequence of procedural defaults during trial proceedings, and its reluctance to declare that novelty of the legal principle could never constitute cause for failure to object was made in the context of concern about the burden such a rule would impose upon trial lawyers and trial courts. The default here occurred in the appellate process. But if novelty is never cause for failure to raise the contention on appeal, the burden placed upon lawyers and appellate courts would be heavy. If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post con-

viction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable. In a criminal case, of course, a convicted defendant's lawyer must present any contention his client wishes him to present, but he may do that without a representation of his own endorsement. A very novel constitutional claim is unlikely to spring from such a client.

Wainwright v. Sykes, 433 U. S. 72 (1977), stated that the cause and prejudice exception was intended to provide for the adjudication of a claim which, in the absence of such adjudication, would result in a miscarriage of justice. In an absolute sense, no one can say that there was a miscarriage of justice in this case, for the jurors may have believed the prosecution witnesses beyond all reasonable doubt. On the other hand, no one can say that the verdict was not reached because the jurors placed the burden of persuasion upon the defendant rather than upon the state, just as they were instructed. Because the burdens of persuasion of his two defenses were placed on him, Ross did not receive a fair trial. Such major unfairness in a trial is itself a miscarriage of justice.

Since the question was novel and since counsel had no reasonable basis for asserting the constitutional claim on appeal, we conclude that there was cause for the failure to present it on appeal as well as prejudice from the instruction itself.

IV.

It is settled by the Supreme Court's decision in *Mullaney, supra,* that allocation to Ross of the burden of persuasion as to the lack of malice was in violation of his constitutional right. This court has held that requiring him to bear the burden of persuasion on his claim of self defense was also a violation of his constitutional right. *Wynn v. Mahoney,* 600 F. 2d 448 (4th Cir.), *cert. denied,* 444 U. S. 950 (1979).

V.

The judgment is reversed and the case remanded to the district court with instructions to issue a writ of habeas corpus unless, within a reasonable time, Ross is retried.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 82-6537

Daniel Ross,

Appellant,

versus

Amos Reed, etc. and Attorney General of the State of North Carolina,

Appellees.

ORDER

Upon consideration of the petition for rehearing, no judge in regular active service having requested a poll of the court on the suggestion of rehearing *en banc*, and with the concurrence of Chief Judge Winter and Judge Ervin,

IT IS ORDERED, that the petition for rehearing be, and it hereby is, denied.

Clement F. Haynsworth, Jr.
United States Circuit Judge

FILED May 4, 1983
U. S. Court of Appeals, Fourth Circuit

APPENDIX C

SUPREME COURT OF THE UNITED STATES

Office of the Clerk
Washington, D. C. 20543

April 19, 1982

Mr. Richard N. League
Assistant Attorney General
P. O. Box 629
Raleigh, NC 27602

Re: Daniel Ross,
v. Amos Reed, etc., et al.
No. 80-6701

Dear Mr. League:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of Engle v. Isaac, 456 U. S. — (1982) and United States v. Frady, 456 U. S. — (1982).

Very truly yours,

Alexander L. Stevas, Clerk

No. 83-218

In The
Supreme Court of the United States
October Term 1983

AMOS REED, etc., and the
ATTORNEY GENERAL OF THE
STATE OF NORTH CAROLINA,

Petitioner,

vs.

DANIEL ROSS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

RICHARD N. LEAGUE
Special Deputy Attorney General
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BARRY NAKELL
Professor of Law
University of Colorado, Boulder
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PETITION FOR CERTIORARI FILED JULY 29, 1983.
CERTIORARI GRANTED DECEMBER 5, 1983.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

2/03/78 1. ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—(Dupree, J).

2. PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY and AFFIDAVIT IN SUPPORT OF

REQUEST TO PROCEED IN FORMA PAUPERIS.

3/13/78 3. ANSWER TO PETITION AND MOTION TO DISMISS w/ cs.

3/14/78 4. COPY OF TRANSCRIPT—No. 18 Supreme Court of N.C., Fall Term 1969, from Wake—to be attachmen to Answer filed 3/13/78.

3/21/78 6. SUPPLEMENTARY TRAVERSE TO THE RETURN MOTION TO DISMISS AND PETITION FOR HABEAS CORPUS.

• • •

10/22/80 17. ORDER . . .

10-23-80 18. JUDGMENT ON DECISION BY THE COURT—plaintiff's motion to file Exhibits is granted, defendant's motion to dismiss is granted, and this action is hereby dismissed.

11-03-80 19. NOTICE OF APPEAL—1c League, 1c 4th Circuit, 1c Judge Dupree. (ent. 12-2-80).

EXCERPTS FROM PETITION

DANIEL ROSS
Name

20747-92-09
Prison Number

CALEDONIA PRISON FARM

BOX 137, TILLERY, NC. 27887
Place of Confinement

United States District Court EASTERN
District of NORTH CAROLINA

CASE No. #78-62-HC

DANIEL ROSS, PETITIONER

v.

AMOS REED, etc., et al., RESPONDENT

and

THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, ADDITIONAL RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

• • •

1. Name and location of court which entered the judgment of conviction under attack WAKE COUNTY SUPERIOR COURT, WAKE COUNTY, N. C.
2. Date of Judgment of conviction MARCH 16, 1969.
3. Length of sentence LIFE Sentencing Judge LEO CARR.
4. Nature of offense or offenses for which you were convicted: 1st Degree Murder.
5. What was your plea? (Check one)
   (a) Not guilty (×)
6. Kind of trial:
   (a) Jury(×)
7. Did you testify at the trial? Yes (×)
8. Did you appeal from the judgment of conviction? Yes (×)
9. If you did appeal, answer the following:
   (a) Name of court NORTH CAROLINA SUPREME COURT.
   (b) Result NO ERROR.
   (c) Date of result OCTOBER 15, 1969.

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: U.S. SUPREME COURT, No review.

• • •

(12) B. Ground two: DENIAL OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

Supporting FACTS (tell your story *briefly* without citing cases or law): THE COURT CHARGED THE JURY, "THERE ARE TWO PRESUMPTIONS THAT ARISE IN FAVOR OF THE STATE: ONE, THAT THE KILLING WAS UNLAWFUL; TWO, THAT IT WAS DONE WITH MALICE; AND THE BURDEN THEN SHIFTS TO THE DEFENDANT, ETC. (Rp 42). HENCE PLACED UPON THE PETITIONER BURDENS OF PROOF LATER HELD BY THE U.S. SUPREME COURT TO BE VIOLATIVE OF DUE PROCESS, MULLANEY V. N. C., 421 US 684 (1966) WHICH RULING WAS GIVEN RETROACTIVE EFFECT IN HANKERSON V. N.C., 421 US 684 (1977) AND APPEARS AT (Rp 42).

C. Ground three: DUE PROCESS REQUIRES NORTH CAROLINA TO PROVE DELIBERATE RATE BY-PASS OR KNOWING AND INTELLIGENT WAIVER STANDARD.

Supporting FACTS (tell your story *briefly* without citing cases or law): THE ISSUES AROSE AS A MATTER OF LAW AND AFTER HIS APPEAL, MULLANEY V. N.C., 421 US 684 (1966) WHICH RULING WAS GIVEN RETROACTIVE EFFECT IN HANKERSON V. N. C., — US —, (1977). THE N.C. COURTS HAVE NOT ATTEMPTED TO PROVE DELIBERATE BY-PASSED THE ISSUES ASSERTED BY PETITIONER OR HIS FAILURE TO RAISE THE ISSUES IN OTHER PETITIONS FILED IN THIS MATTER OR ASSERT THEM AT THE TIME OF HIS TRIAL OR ON DIRECT APPEAL NOR HAS THE STATE AFTER AN AR-

GUMENT THEREON, BY A FULL AND FAIR EVIDENTIARY HEARING, TOWNSEND V. SAIN, 372 US 293 (1963) PROVEN "KNOWING AND INTELLIGENT WAIVER" STANDARD OF JOHNSON V. ZERBST, 304 US 458 (1938); FAY V. NOIA, 372 US 391 (1963).

• • •

Executed on 1-17-78, 1978.
(Date)

/s/ Daniel Koss
(Signature)

Filed February 3, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

78-62-HC

DANIEL ROSS,

Petitioner,

v.

AMOS REED, etc., et al.,

Respondents.

ANSWER TO PETITION AND MOTION TO DISMISS

(Filed March 15, 1978)

TO: THE HONORABLE PRESIDING JUDGE OF SAID COURT:

The respondents, answering and moving to dismiss the petition for writ of habeas corpus filed herein, say:

1. Petitioner is a prisoner of the State of North Carolina who, at the March 17, 1969, Session of Wake

County Superior Court, Honorable Leo Carr, Judge Presiding, entered a plea of not guilty in case number 68 CR 4266, in which he was charged with murder in the first degree. Upon this plea, he was tried by jury, before whom he testified, was convicted of murder in the first degree with a recommendation that the sentence be life imprisonment and was sentenced by Judge Carr to life imprisonment. Petitioner appealed his conviction to the North Carolina Supreme Court, which court, in an opinion filed 15 October 1969 and reported at 275 NC 550, found no error. Petitioner was represented at trial and on appeal by William Merriman, Esquire. Since that time, this Honorable Court has had occasion to become familiar with petitioner through several applications for writ of habeas corpus with this Court challenging either his conviction or matters relating to his imprisonment, *Ross v. Blackledge,* Civil 2186, application denied March 9, 1972, affirmed on appeal No. 72-1949, August 8, 1972; *Ross v. Blackledge,* Civil 4030, application denied September 1, 1972, affirmed on appeal 73-1378, April 16, 1973; *Ross v. Lewis,* Civil 4454, application denied January 2, 1974, affirmed on appeal 74-1194, May 26, 1976; *Ross v. Baker,* Civil 74-129-HC, application denied July 1, 1975, affirmed on appeal 75-8243, filed August 4, 1976. Additionally, petitioner received certain pre-trial credits against his sentence in an application entitled *Ross v. Blackledge,* Civil 3038, relief allowed June 2, 1972, and presently has one additional writ pending before this Honorable Court, *Ross v. Reed,* 77-329-HC.

2. Petitioner contends his constitutional rights were violated because the state was allowed to use presumptions of malice and unlawfulness against him by proving

that his victim was murdered with a deadly weapon. Petitioner has exhausted his state remedies with regard to this contention and it entitles him to no relief.

3. Petitioner's claim is unmeritorious for a number of procedural and substantive reasons. First, this matter was not raised on appeal and under state procedural law, *eg. State v. Brower and Johnson,* 293 NC 259 (1977), review of it is forfeited. The basis of the North Carolina Supreme Court's decision in the above case is that footnote 8 of *North Carolina v. Hankerson,* — US — (1977) insulates this type of claim from review under the circumstances presented in petitioner's case. That footnote reads in part as follows:

> ". . . It is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions . . . . Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instruction anyhow. The states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any error. See *eg.* FRCP 30."

North Carolina does not have this rule except for errors in recapitulating the evidence and errors in the statement of the contentions of the parties or failures to charge on the "subordinate features" of the case, *4 Strong's North Carolina Index 2d,* Criminal Law, § 113.9, 163. However, it has a comparable one to that referenced in footnote 8— that failure to raise an issue of record on appeal bars its subsequent review by collateral means, N.C. G.S. § 15-217; *State v. White,* 274 NC 220 (1968). This is also comparable to existing federal decisional law that a writ of habeas

corpus cannot be used as a substitute for appeal, see 28 USCA § 2255, note 12 and annotations contained therein; and the necessary corollary of this rule that failure to raise such an issue on appeal forfeits review of it. Therefore, respondents believe that the above dictate dismissal of petitioner's application on both of the procedural grounds above.

4. Additionally, petitioner's assertion is without any substantive merit. The presumptions about which petitioner complains deal with the crime of second degree murder. Petitioner was convicted of first degree murder and accordingly the presumptions were not used to his detriment. This being so, any error would be harmless beyond a reasonable doubt and therefore not a basis for relief to petitioner, *Chapman v. California,* 386 US 18 (1967); *Harrington v. California,* 395 US 250 (1969). Further, in *Mullaney v. Wilbur,* 421 US 634 (1975), the case on which petitioner apparently relies, the Supreme Court commented on the use of presumptions such as the one involved in petitioner's case. The comment appeared in footnote 31 at which place the Supreme Court did not condemn such presumptions but instead stated only that they must "satisfy certain due process requirements". The Court then cited *Barnes v. United States,* 412 US 837 (1973) which case holds that ". . . if a statutory inference submitted to the jury as sufficient to support conviction . . . is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt . . . then it clearly accords with due process". This fits in with the *Mullaney* decision because the vice condemned by that case is the possibility of conviction of one offense where it is as likely as not that an accused deserves conviction for a signifi-

cantly lesser offense. However, the ideas expressed by *Mullaney* and by *Barnes* are not denigrated by the use of the presumptions of malice and unlawfulness involved in this case. This is because the killing of another with a deadly weapon is not normally a lawful act or one done without the quality of malice accompanying it. Instead, in the overwhelming number of cases, the opposite is true. Accordingly, the presumption petitioner attacks does not run afoul of either of the above judicial precedents and, in fact, enhances the reliability of the fact-finding process by precluding a "doubting Thomas" approach to the evidence. In addition, with regard to the presumption relating to unlawfulness, the determination of this fact is largely a determination of the matter of privilege or excuse. Therefore, the use of this presumption presents a situation somewhat akin to the one presented in *Leland v. Oregon*, 343 US 790 (1952), where the Supreme Court upheld the burden of proof of insanity being placed on an accused. Accordingly, for the additional reasons above, petitioner is not entitled to any relief.

5. Although petitioner does not allege it, it appears that the burden of proof to satisfy the jury with regard to self-defense was also placed on petitioner. Should this Honorable Court desire to take judicial notice of that fact and adjudicate this claim, respondents contend that the same procedural bars previously set out apply to this contention. Additionally, respondents contend that *Mullaney v. Wilbur, supra,* does not preclude the placing of the burden of proof on self-defense on an accused in a murder case. *Mullaney* involved an attempt by a state to shift part of the burden of proof with regard to an ele-

ment of the crime to an accused. Shifting the burden on self-defense, however, does not involve this because self-defense does not negative any of the elements of the crime but instead goes to show some matter of justification or excuse which is a bar to the imposition of criminal liability, see *LaFave and Scott,* Criminal Law, p. 146. In accordance with this approach is *Patterson v. New York,* — US — (1977). In light of the foregoing then, a writ of habeas corpus should not issue on account of this factor in petitioner's case.

WHEREFORE, respondents, pray that Your Honor will deny the said petitioner's application and that a writ of habeas corpus will not be issued in his behalf.

Respectfully submitted,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

/s/ Richard N. League (PBH)
Assistant Attorney General

(Verification and Service Omitted.)

EXCERPT OF SUPPLEMENTARY TRAVERSE
(Filed March 21, 1978)

2. . . . . Under the rule of law set forth in *Mullaney v. Wilbur* and *Hankerson v. North Carolina,* North Carolina's jury instruction requiring the defendant to prove self-defense violates the Due Process Clause of the Fourteenth Amendment in a First Degree Murder prosecution.

No. 105 PC TWENTY-SECOND DISTRICT
DAVIDSON COUNTY

SUPREME COURT OF NORTH CAROLINA

Fall Term 1978

STATE OF NORTH CAROLINA

v.

BILLY LEE HANCOCK

ORDER AWARDING NEW TRIAL UPON DEFENDANT'S PETITION FOR FURTHER REVIEW

Defendant petitioned Davidson Superior Court for post-conviction relief on the ground that at his trial for second degree murder at the 17 March 1975 session of that court the trial court unconstitutionally placed the burden of proving the absence of malice in order to reduce his crime to manslaughter, and self-defense in order to excuse it altogether upon the defendant. From a denial of this petition defendant applied for a writ of certiorari to the Court of Appeals which was likewise denied on 9 October 1978. He petitions us for further review of that denial.

The issue of self-defense was properly presented at defendant's trial. The trial judge in his jury instructions placed the burden of proving this defense upon the defendant. Although defendant did not assign this as error in his appeal to the Court of Appeals, which found no error in his trial, State v. Hancock, 28 N. C. App. 149, 220 S. E. 2d 167 (17 December 1975), defendant did seek to appeal to this Court on the ground, among others, that the jury instructions in his trial violated Mullaney

v. Wilbur, 421 U. S. 684 (9 June 1975) as interpreted in State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (17 December 1975). Having determined in Hankerson that the Mullaney rule was not retroactive, we allowed the state's motion to dismiss defendant's appeal. In Hankerson v. North Carolina, 432 U.S. 233 (1977), the United States Supreme Court determined that we had erred in declining to hold the *Mullaney* rule fully retroactive.

Inasmuch, therefore, as defendant did seek to raise on direct appeal to this Court, and before the judgment against him was final, the question of the constitutionality of the trial judge's instruction placing the burden on defendant to prove self-defense and the Court being of the opinion that in light of Mullaney v. Wilbur, *supra,* and Hankerson v. North Carolina, *supra,* his appeal on that ground should have been allowed and defendant awarded a new trial, the Court having permitted the defendant Hankerson to raise the same question for the first time in this Court, State v. Hankerson, *supra,* now, therefore, it is

ORDERED by the Court in conference that defendant's petition for further review be allowed for the sole purpose of further ordering that defendant be and he is hereby awarded a new trial. *See* orders earlier entered in various cases at 293 N.C. 259-263 (1977).

This the 29th day of November, 1978.

/s/ _____
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 30th day of November, 1978.

/s/ John R. Morgan
Clerk of the Supreme Court
of North Carolina

BILL OF INDICTMENT File #68-CR-4266

In the General Court of Justice, Superior Court Division
STATE OF NORTH CAROLINA
COUNTY OF WAKE

1st February "R" Session, 1969

The State of North Carolina

v

Daniel Ross, Defendant

INDICTMENT—MURDER

THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, that Daniel Ross late of the County of Wake on the 2nd day of November 1968, with force and arms, at and in the said county, feloniously, wilfully, and of his malice aforethought, did kill and murder Mary Elizabeth Young Ross contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

W. G. RANSDELL, JR.
Solicitor

WITNESSES:

X D. W. Martin (RPD)
X J. L. Barbour (RPD)
Leon Gerell Young
Charles McAllister

Those marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found A True Bill.

TED L. DANIEL
Foreman Grand Jury

(Returned 10 February 1969)

• • •

ORDER OF APPOINTMENT OF LEGAL COUNSEL FOR INDIGENT DEFENDANT (14 FEBRUARY 1969)

• • •

CLERK'S MINUTES

3/17/69—The defendant having been arraigned as appears of record, the selection of the jury began.

3/18/69—After the selection of the jury was completed and the 12 jurors were empaneled the court ordered that a 13th or alternate juror be chosen.

Leon Gerald Young, Charles McCallister, J. L. Barbour, Dr. Dewey Pate and E. B. Pearce were sworn and examined in behalf of the State.

At the close of the State's evidence the defendant's motion for judgment as of nonsuit denied. Defendant excepts.

Bernice Ross and Daniel Ross were sworn and examined in behalf of the defendant.

Leon Gerald Young, Charles McCallister and J. L. Barbour were recalled by the State in rebuttal.

Bernice Ross recalled by the defendant in rebuttal.

D. W. Martin was sworn and examined in behalf of the State.

At the close of all the evidence the defendant's motion for judgment as of nonsuit denied. Defendant excepts.

Pending further action in this case the court recessed until 9:30 a.m. Friday, March 19, 1969.

3/19/69—After argument of counsel for the defendant, argument of the solicitor for the State the court finds that juror #7, Charles B. Cooke has a death in his immediate family and that it is brother-in-law and the fu-

neral is this afternoon; the court in its discretion excuses juror Charles B. Cooke to the end that he may be with his family and attend the funeral of his brother-in-law this afternoon and directs that the 13th juror Calvin R. Boseman, Jr. now take seat #7 in the jury box and that he become one of the regular jurors.

Jury empaneled.

After the charge of the court and jury deliberation, the jury returned a verdict of guilty of murder in the 1st degree with the recommendation that punishment be life imprisonment in the State Prison.

Upon motion of the defendant through his attorney the jury was duly polled.

The defendant through his attorney moved that the verdict be set aside and moved for a new trial. Denied. Defendant excepts.

See signed Judgment.

Defendant in open court gives notice of appeal to the North Carolina Supreme Court. (See Appeal Entries).

JANE L. CARUTHERS
Ass't Clerk Superior Court

PLEA, VERDICT, JUDGMENT AND COMMITMENT

In open court, the defendant appeared for trial upon the charge of Murder, and thereupon entered a plea of not guilty. Evidence was heard for the State and for the defendant including testimony of the defendant in his own behalf. The jury, after deliberation, returned a verdict of guilty of murder in the 1st degree with the

recommendation that punishment be life imprisonment in the State Prison.

Having been found guilty of the offense of murder in the 1st degree with the recommendation that the punishment be life imprisonment in the State Prison which is a violation of the law and of the grade of felony.

It is ADJUDGED that the defendant be imprisoned for the term of the remainder of his natural life in the State Prison to be assigned to work under the supervision of the North Carolina Department of Correction.

• • •

EXCERPTS FROM
DEFENDANT'S EVIDENCE

DANIEL ROSS Testified:

My name is Daniel Ross. I am twenty-one years old. On November 2, 1968, I was living in Jamica, New York. At that time I was married to Mary Elizabeth Ross and we had two children. Mary and I were not separated; however, I had been living in New York for about two months.

On November 2, 1968, I rode a bus to Raleigh to see my wife and children. When I arrived in Raleigh, I went to my mother's home and met my sister, Bernice Ross. At about 2:30 or 3:30, my sister and I drove to my mother-in-law's house. My wife's brother, Leon Young, my wife, my sister-in-law, my two children, and Charles McAllister were there.

Bernice Ross, Mary Ross, and my two children and I left to go to North Hills Shopping Center. After buy-

ing some clothes for my children, we left North Hills Shopping Center and went back to my mother-in-law's house. My sister, my wife, and I went into the house. Charles McAllister was in the bathroom and my sister asked him to let her use the bathroom. When Bernice came out of the bathroom, my wife asked her to leave the room so that we could talk in private. My wife and I had a conversation about a girl that I used to mess around with. At that time, Leon Young came inside the room and went into the kitchen. Mary walked to the kitchen and whispered something in his ear.

My wife and Leon were in the kitchen talking and Leon picked up a knife, fork, or something. When I got up and started back in the room, my wife, all of a sudden, stabbed me in the back of the neck. It felt something like a sting. I had the baby in my arms and I don't know whether I dropped the baby or whether someone took the baby or what. When I turned around, I turned around shooting. My wife had one arm up with a knife in her hand. I shot twice.

Charles McAllister came out of the bathroom and Leon approached me with some object in his hand as I was standing on the steps. I unloaded the gun, put another bullet in the gun, and fired a shot toward Leon. I ran to the car. Blood was coming out of my neck real fast, and the side of my sleeve was bloody, and all down my front was bloody. I ran out to the car, put my three year old child in the car and my sister drove away out 64 East. She started to make a turn at Wake Memorial Hospital, and I told her not to go there. We drove to Southampton Memorial Hospital in Franklin, Virginia,

where I received treatment for a stab wound. At the hospital I gave them my name as Coldon Ross.

(A medical report from Southampton Hospital was introduced into evidence upon agreement from the solicitor, allowing introduction of the same.)

After I left the hospital, I went to Richmond, Virginia, and spent the night in a hotel. I found out that my life was dead about 10:00 or 10:30 when I called Wake Memorial Hospital. The next day I went to New York City and stayed there until I was picked up by the police, on November 29, 1968. I fired the first two shots because I had been stabbed in the neck, and I was defending myself. I fired the third shot because I was afraid Charles McAllister was going to try to do something to me, and her brother having this object in his hand.

• • •

JUDGE'S CHARGE

(ROA 34) Members of the jury, the defendant in this action, Daniel Ross, is charged with murder. The State alleges in the bill of indictment that he is guilty of murder in the first degree. To the charge in the indictment the defendant came into open court and entered a plea of not guilty to the charge and that—. Upon his entering such a plea the law raised a presumption in his favor that he is innocent of the charge, and that presumption of innocence goes with him and surrounds him throughout every stage of his trial until the jury finds beyond a reasonable doubt that he is guilty. The burden is on the State to satisfy the jury beyond a reasonable doubt of his guilt.

• • •

(ROA 35) The court instructs you that murder in the first degree is the unlawful and wilful killing of a human being with malice and with premeditation and deliberation.

• • •

(ROA 36) There are three other verdicts that you may render in addition to guilty of murder in the first degree or guilty of murder in the first degree with the recommendation that the punishment be life imprisonment instead of death or murder in the second degree, guilty of murder in the second degree, guilty of voluntary manslaughter or not guilty.

EXCEPTION NO. 14

The court instructs you that murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Malice is not only hatred, ill-will, or spite, as it is ordinarily understood, but it also means that condition of mind which prompts a person to intentionally take the life of another without just cause, excuse, or justification. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the intentional killing with a deadly weapon; and a pistol or a gun is a deadly weapon.

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation, and in this case the court will instruct you with respect to voluntary manslaughter. There being two kinds of manslaughter, voluntary manslaughter and involuntary manslaughter; involuntary manslaughter being a grade of manslaughter that arises when there is an unintentional killing

of a person by the culpably negligent use of a deadly weapon with no intention to assault with and cause injury but by reason of the culpably negligent use of the weapon, but that does not arise in this case and you are concerned with whether or not on the charge of manslaughter the defendant is guilty of voluntary manslaughter; and in that respect the court instructs you that voluntary manslaughter is said to be the unlawful killing of another without malice and an instance of that being where one unlawfully kills another by reason of anger aroused by provocation which the law deems adequate. In such case the anger so aroused is held to displace malice and will reduce the unlawful homicide to the grade of manslaughter. Reason should at the time of the act be disturbed or obscured by passion to the extent which might render an ordinary man of fair, average disposition liable to act rashly or without due deliberation or reflection and from passion rather than judgment.

EXCEPTION NO. 15

The defendant in this action relies upon the doctrine of self-defense and contends that any shooting that he did he was acting in his own proper self-defense. The court instructs you that when one is without fault and an assault is made upon him with a deadly weapon with such intensity as to cause him to believe that he is about to suffer death or great bodily harm at the hands of his adversary and he has a reasonable ground for such belief he does not have to retreat, but may stand his ground and defend himself and protect himself from death or great bodily harm; and in doing so he may use such force as is reasonably necessary or he believes is necessary, and he has a reasonable ground for such belief to protect himself from death

or great bodily harm, and if he kills his assailant and it is necessary, or he believes it to be necessary to protect himself from death or great bodily harm and he has a reasonable ground for such belief it is an excusable homicide.

The court instructs you in connection with the doctrine of self-defense that a person is not, even though permitted to use a deadly weapon in his own defense, to use any more force than is reasonably necessary to accomplish the purpose in mind, that is to protect his self from death or great bodily harm; and as the court has instructed you he can use such force as is necessary or he believes is necessary and has reasonable ground for that belief to protect himself from death or great bodily harm. It is for the jury and not the defendant to say whether or not he had reasonable ground to believe that he was about to suffer death or great bodily harm at the hands of his assailant, and it is for the jury and not the defendant to say whether or not he used more force than was reasonably necessary under the circumstances to accomplish the purpose he had in mind. In determining those two facts, however, it is the duty of the jury to put, that is jurors to put themselves in the position of the defendant at the time of the killing and to determine those facts in the light of how the circumstances appeared to him at that time and not in the light of how they now appear to the jury; and in doing that it is the duty of the jury not to weigh the conduct of the defendant in golden scales.

EXCEPTION NO. 16

• • •

(ROA 39) The State contends that you should return a verdict of guilty of murder in the first degree.

• • •

(ROA 41) If you are not satisfied beyond a reasonable doubt that he did kill her with malice and deliberation and premeditation then you will—you do not find the evidence sufficient to render a verdict of guilty of murder in the first degree then the State contends that you should consider whether or not he is guilty of murder in the second degree or manslaughter.

Now, in respect to that the court instructs you that in a case where a person is killed as a result of a gun shot wound fired intentionally that where the State has satisfied you beyond a reasonable doubt that the defendant intentionally assaulted the deceased with a deadly weapon and that such assault caused her death there are two presumptions that arise in favor of the State: One, that the killing was unlawful; two, that it was done with malice; and the burden then shifts to the defendant under those circumstances to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but to satisfy the jury that the killing was not done with malice if he would acquit himself of a charge of murder in the second degree, that is if he would expect and ask at your hands a verdict of less than guilty of murder in the second degree the burden would be upon him under the circumstances to satisfy the jury that the killing was not done with malice and if he would exonerate himself and show that the killing was not unlawful then the burden is upon him to satisfy the jury, as the court has indicated not beyond a reasonable doubt nor by the greater weight of the evidence but to satisfy the jury that the killing was done

under some, for some reason recognized by the law as justifiable; and he relies here on self-defense; contends that you should find that he did not kill her except in his own proper self-defense within the meaning of that term as it has been defined to you by the court. (Italics supplied.)

The State contends, however, that you should not find, if you come to consider the question of whether or not he is guilty of murder in the second degree; that you should find from the evidence he intentionally assaulted his wife with a deadly weapon and that that assault resulted in her death and that there is nothing in the evidence, so the State contends, that should lead you to believe that he has satisfied you from the evidence that the killing was done without malice; and that in that event you should return a verdict of guilty of murder in the second degree.

• • •

(ROA 44) He contends that you should find that there was some argument over a woman and one word brought on another and the first thing he knew she went into the kitchen and with the aid of her brother, I believe, who handed her some kind of a weapon, she came back where he was and stabbed him in the back of the neck with a knife or some weapon that caused a considerable gash in his neck and caused him to fear that she was going to assault him again;

• • •

(ROA 45) Now, he makes this contention, that he did shoot another time. I believe an officer went on the stand and testified that he did see two empty cartridges at the side door and one that was loaded. He contends that he reloaded his pistol which didn't have—wouldn't

hold but two cartridges he contends; and that his shooting after the shooting that occurred in the room when he shot the first two shots that that was not at his wife, but that he was in fear of his wife because he testified, as the court recalls, that McAllister had a weapon of some kind.

• • •

(ROA 46) If you find that he did not shoot at his wife and shot at McAllister, then the court instructs you that the burden would be upon the State to satisfy you under those circumstances beyond a reasonable doubt that he intentionally assaulted McAllister if he shot at McAllister with a deadly weapon, to wit: a pistol, and he had no lawful right to do so, and in doing so he, the bullet hit his wife then he would be guilty if the State has satisfied you beyond a reasonable doubt that he shot at McAllister trying to hit him and did it with malice and did not under circumstances showing that he did not have the right to do it under the doctrine of self-defense as that term has been defined and explained by the court, then in that event he would be guilty of murder in the second degree.

• • •

(ROA 49) And in respect to the assault made upon his wife . . . he has not satisfied you that such killing was done without malice, it would be your duty to return a verdict of guilty of murder in the second degree. If under those circumstances he has satisfied you that the killing was done without malice, you would then proceed to the consideration of whether or not he is guilty of voluntary manslaughter.

• • •

(ROA 51) If the State has satisfied you beyond a reasonable doubt that he shot at McAllister but did not have any right to do so under the doctrine of self-defense, as that term has been defined and explained to you by the court, then in that connection it would be your duty to return a verdict of guilty of voluntary manslaughter.

• • •

However, if under those circumstances in connection with his contention, if you accept his contention to be correct, that in the hall he did not shoot at his wife but was shooting at McAllister and the State has failed to satisfy you beyond a reasonable doubt in shooting at McAllister that he did not have the right to shoot at McAllister under the doctrine of self-defense, as that term has been defined and explained to you by the court, and that under those circumstances in shooting at McAllister he hit his wife it would be your duty to return a verdict of not guilty.

EXCERPT FROM NORTH CAROLINA SUPREME COURT DECISION ON ROSS' APPEAL

[4] In addition to the objection to the cross examination of the defendant and the introduction of the bullets in evidence, the defendant contends the court committed error in failing to charge the jury that it might render a verdict of involuntary manslaughter. The court charged the jury that under the evidence it might render one of these verdicts: (1) guilty of murder in the first degree; (2) guilty of murder in the first degree with recommen-

dation that the punishment be imprisonment for life in the State's prison; (3) guilty of murder in the second degree; (4) guilty of manslaughter; (5) not guilty. The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty; and that the failure of the State to carry the burden required a verdict of not guilty. The court charged fully and correctly on the defendant's right to defend himself and to repel felonious assault.

275 NC at 554

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

No. 78-62-HC

DANIEL ROSS,

Petitioner,

vs.

AMOS REED, etc., et al.,

Respondents.

ORDER

(Filed October 22, 1980)

This petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254 is before the court for a ruling after having been stayed pending the Fourth Circuit's decision in *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980). After *Cole* the parties were ordered to file written arguments applying the *Cole* opinion to this case. The parties have so responded and the case is now ripe for decision.

Petitioner Ross was convicted of first-degree murder in 1968. On direct appeal he excepted to certain aspects of the trial judge's charge to the jury. In his Assignment No. 9, he contended that the trial court should have charged the jury as to the law of involuntary manslaughter. In his Assignment No. 10, he contended that the court did not properly define self-defense. (Record on Appeal to N. C. Supreme Court, p. 57.) He did not except to that portion of the charge where the judge placed upon the defendant the burden to rebut a presumption that an intentional killing is done unlawfully and with malice. (Record on Appeal, p. 42.) Furthermore, the trial judge departed from the then customary charge and instructed the jury that the state had the burden to satisfy the jury beyond a reasonable doubt that the killing had not been in self-defense. (Record on Appeal, p. 51.) In considering petitioner Ross' appeal of jury instruction errors, the North Carolina Supreme Court stated: "The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty; and that the failure of the state to carry the burden required a verdict of not guilty." *State v. Ross*, 275 N.C. 550, 554, 169 S.E.2d 875 (1969).

Ross contends that these assignments of error adequately raised the *Mullaney* issues on his direct appeal to permit him to avoid the procedural default bar announced in *Cole*. It is clear from the record, however, that he did not clearly present the *Mullaney* issues as required by the North Carolina Supreme Court Rule 19 (3). *See, e.g., State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596 (1973), *motion for reconsideration denied*, 293 N.C. 260, 247 S.E. 2d 234 (1977). The issue presented is whether the North

Carolina Supreme Court, by addressing Ross' contentions in such a broad fashion, waived its own rule and considered the *Mullaney* issue sua sponte.

The North Carolina Supreme Court has at times waived its rule that asserted errors be clearly presented and has proceeded to the merits of asserted errors in jury instruction where those errors had not been clearly presented. *E.g., State v. Freeman,* 295 N.C. 210, 244 S.E.2d 680 (1978); *State v. Rigsbee,* 285 N.C. 708, 208 S.E.2d 670 (1974). In such cases the Supreme Court's waiver is explicitly acknowledged. In the present case the Supreme Court did not explicitly waive its rule and cannot reasonably be said to have actually considered the *Mullaney* issue despite he broad language of the holding.

Accordingly, plaintiff's motion to file exhibits is granted, defendant's motion to dismiss is granted, and this action is hereby dismissed.

SO ORDERED.

/s/ F. T. Dupree, Jr.
United States District Judge

October 21, 1980.

Filed October 22, 1980.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-218

AMOS REED, et al.,

Petitioners,

v.

DANIEL ROSS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Barry Nakell
1900 Baseline Road
Boulder, Colorado 80302
(303) 492-7458
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Attorney for Respondent

STATEMENT OF THE CASE

The essential facts are as follows:

(A) Respondent was convicted in March, 1969, of first degree murder at a trial in which the court unconstitutionally instructed the jury that he had the burden of proof on his partial defense of lack of malice and also on his complete defense of self defense. North Carolina procedure did not require respondent to object to those instructions. Accordingly, this case does not involve a failure to comply with a contemporaneous objection rule at trial

(B) Respondent did appeal his conviction. Although he did not expressly challenge the constitutionality of the instructions imposing the burden of proof on him, the State Supreme Court held:

> "The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty . . . While the defendant did not point out and assign as error any particular or designated portion of the charge as required by appellate rules, we have examined the charge and conclude it is in accordance with legal requirements and is unobjectionable."

State v. Ross, 275 N.C. 550, 554, 169 S.E.2d 875, 878 (1969).

(C) The decision of the North Carolina Supreme Court was filed on October 16, 1969. This Court did not decide In re Winship, 397 U.S. 358 (1970), until over five months later, and did not decide Mullaney v. Wilbur, 421 U.S. 684 (1975), until five and one-half years later.

(D) Respondent promptly pursued state post-conviction remedies after this Court's decision in Mullaney v. Wilbur, supra, and Hankerson v. North Carolina, 432 U.S. 233 (1977). The North Carolina courts refused to give him the benefit of that decision because of his failure before either Winship or Mullaney had been decided to raise the issue on appeal. Nevertheless, the North Carolina courts have reviewed and set aside convictions in other cases on Mullaney grounds despite the failure of the defendants in those cases to raise the issue on appeal, e.g., State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975); State v. Hancock, No. 105 PC (N.C. Sup. Ct. Nov. 30, 1978), and the State Attorney

General has waived the procedural default in other cases. E.g., Wynn v. Mahoney, 600 F.2d 448, 450 n.1 (4th Cir.), cert. den., 444 U.S. 950 (1979).

REASONS FOR DENYING THE WRIT

The present case raises issues that involve the factual integrity of the adjudication of guilt in the state court. Hankerson v. North Carolina, 432 U.S. 233, 242 (1977). Although respondent was concededly convicted at an unfair trial in which due process violations substantially impaired the truth-finding process, the State contends that his conviction should be upheld simply because he did not raise the issue on appeal, even though he did appeal and even though he did raise the issue in the state courts as soon as this Court decided Mullaney and held that it applied to his trial, even though the state courts have decided the issue in other cases where it was not timely raised on appeal, and even though the State has waived the failure in similar cases. That contention is contrary to the holding of Fay v. Noia, and is not supported by any federally cognizable policy or any legitimate state interest.

I. In Fay v. Noia, 372 U.S. 391 (1963), this Court held that a state criminal defendant's failure to appeal from his conviction -- as long as it was not a deliberate by-pass of state remedies -- was not a bar to federal post-conviction review. That decision governs this case. Contra, Cole v. Stevenson, 620 F.2d 1055 (4th Cir.) (en banc, 6-3), cert. den. 449 U.S. 1004 (1980) (with three Justices voting to grant).*

It is clear that any effort by respondent to have raised the issue on his pre-Mullaney appeal would have been futile. After respondent's conviction had been affirmed the North Carolina Supreme Court rejected similar arguments in other cases. State v. Sparks, 285 N.C. 631, 643, 207 S.E.2d 712, 719 (1974); State

* In Cole, the majority decided that this Court overruled Fay v. Noia in footnote 8 in Hankerson v. North Carolina, 432 U.S. 233, 244 (1977), even though six days after deciding Hankerson this Court expressly declared that it was leaving for another day the question of the continuing validity of Fay v. Noia. Wainwright v. Sykes, 433 U.S. 72, 88, n.12 (1977).

v. Harris, 23 N.C. App. 77, 80, 208 S.E.2d 266, 268 (1974). Moreover, after Mullaney was decided the North Carolina Supreme Court held that it did not apply retroactively. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd, 432 U.S. 233 (1977). Thus, the State is insisting in respondent's case on a futile formality. Yet, as this Court recently held: "The law does not require the doing of a futile act." Ohio v. Roberts, 448 U.S. 56, 74 (1980).

II. Because the State Supreme Court on respondent's appeal reviewed the burden of proof instructions at respondent's trial on the merits, there is no state procedural bar to review of the same issue on federal habeas corpus. The Court of Appeals declined to reach this issue in view of its ruling in respondent's favor on another ground, but said: "The claim of waiver is not without some support, but we find it unnecessary to delve behind the rather elusive language of the opinion in an attempt to determine precisely what was in the minds of the justices of the North Carolina Supreme Court when they wrote." Ross v. Reed, Appendix to Petition, page 4 (4th Cir. 1983). Obviously, the North Carolina Supreme Court did not consider and decide the Mullaney issue in exactly those terms, for Mullaney had not yet been decided. The point is that the North Carolina Supreme Court decided that even though respondent did not assign the instructions on burden of proof as error, it was willing to review those instructions anyway, thus waiving the very procedural default that the State is now trying to insist on. As this Court held, if the state courts are not concerned about a procedural default, "a federal court implies no disrespect for the State by entertaining the claim." County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979); see also, Smith v. Bordenkircher, ____ F.2d ____, ____ (4th Cir. Oct. 5, 1983), slip op. at 6.

III. As the Court of Appeals decided: "This case falls within the 'cause and prejudice' exception as applied by the Supreme Court in Engle v. Isaac, 456 U.S. 107 (1982) and United

States v. Frady, 456 U.S. 152 (1982)." Ross v. Reed, Appendix to Petition, page 4 (4th Cir. 1983). The State contends that the Court of Appeals failed to follow footnote 39 in Engle. The Court's opinion, however, considered that contention carefully and answered it persuasively. Id. at 6-7. The State contends that the decision set "District Courts adrift to make unguided, subjective determinations of how many cases and how many prior years are necessary for novelty to wear off." Obviously, the courts are capable of fixing the line. See Solem v. Helm, 103 S. Ct. 3001, 3011 (1983). The courts confront this same question of "novelty" in the context of the qualified privilege for government officials. E.g., Ward v. Johnson, 690 F.2d 1098, 1111-1113 (4th Cir. 1982) (en banc); see also, Harris v. Young, No. 81-6800 (4th Cir. Aug. 16, 1983), slip op. at 7: "The key question to be answered is, when was the law on library or attorney access for prisoners in local jails so enunciated by the courts that a Virginia official knew or should have known that those rights were established."

This case, however, presents a clear example of a situation in which it was appropriate for the Court of Appeals to decide that the issue was novel at the time of respondent's appeal, that respondent's counsel had no basis for asserting it at that time, and that therefore there was cause for the failure to do so:

(1) This Court has recognized that Winship "laid the basis" for this constitutional claim. Engle v. Isaac, supra, 456 U.S. at 131. Respondent's appeal was concluded well before Winship was decided.

(2) The State has contradicted its own position in this regard on two occasions, and shown that even it accepts that the Mullaney doctrine was "novel" in this sense at least until Winship was decided and perhaps not until Mullaney:

(a) Before this Court in Hankerson v. North Carolina, supra, the State of North Carolina argued in its brief against retroactive application of Mullaney because it said the issue did not exist until Mullaney was decided.

(b) Before the Court of Appeals in this case, in arguing that the State Supreme Court had not decided this issue on respondent's appeal, the State argued: "(A)s petitioner has consistently pointed out, the issue here was not a widely litigated one at the time of his appeal making the odds overwhelming that the Supreme Court did not have it in mind when it spoke as it did."

(3) The North Carolina courts certainly did not perceive the issue as they continued to give and approve the unconstitutional instructions.

IV. If the "novelty" of the issue was not cause for respondent's failure to raise it, respondent's counsel had the responsibility to raise it. In that situation, counsel's failure to do so deprived respondent of the constitutionally mandated effective assistance of counsel, and the reversal of his conviction should be upheld on that ground.

Conclusion

For the foregoing reasons,*/ respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

Barry Nakell

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Counsel for Respondent

*/ As the Petition points out, the State has released respondent and he has now enrolled as a student at North Carolina Central University. The State acquiesced in an order by the District Court for respondent's release after the decision by the Court of Appeals. Respondent does not assert that circumstance as a reason for denying the petition. The State should be encouraged to release prisoners in respondent's position, and should therefore not suffer any prejudice to its legal position for doing so.

CERTIFICATE OF SERVICE

I hereby certify that I served one copy of the foregoing Motionfor Leave to Proceed in Forma Pauperis on all counsel required to be served by mailing a copy, first class postage prepaid, addressed as follows:

Mr. Richard N. League
Special Deputy Attorney General
Box 629
Raleigh, NC 27602

Barry Nakell
Barry Nakell

Dated: October 26, 1983

UNIVERSITY OF COLORADO; BOULDER

School of Law

March 20, 1984

Miss June M. Hoffman
Assistant Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Reed v. Ross, No. 83-218

Dear Miss Hoffman:

In my brief on behalf of respondent in the above case, I wrote, at page 2: "The North Carolina Supreme Court has, however, reviewed the correctness of instructions despite the failure of the defendant properly to make that issue the basis of an assignment of error in the record on appeal . . . Indeed, it did exactly that on Ross' appeal . . . ."

At page 41, I further wrote: "North Carolina law provides flexibility in the determination whether to impose a forfeiture for a procedural default."

At oral argument on March 27, I would like to advise the Court of authority in support of those statements in addition to that cited in the brief. By this letter I would like to provide the Court that authority in writing and to advise counsel of it in advance. I hope that this is acceptable. I do not know whether the Court would permit these to be printed pursuant to Rule 41(5).

Rule 2 of the North Carolina Rules of Appellate Procedure, adopted June 13, 1975, provides as follows:

> "To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions."

The Drafting Committee Note to that Rule explains:

> "This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules . . . . The power does not depend

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upon its express reservation by the Court in the body of the Rules."

The North Carolina Supreme Court and the North Carolina Court of Appeals have frequently in civil and criminal cases agreed to reach the merits of an issue despite the failure of a party properly to present it on appeal, as the North Carolina Supreme Court did in Ross' case. E.g.,

State v. Booker, 306 N.C. 302, 293 S.E.2d 78, 84 (1982);

State v. Poplin, 304 N.C. 185, 282 S.E.2d 420, 421 (1981);

State v. Rinck, 303 N.C. 551, 280 S.E.2d 912, 918 (1981);

State v. Cohen, 301 N.C. 220, 270 S.E.2d 416, 418 (1980);

Stillwell Enterprises v. Interstate Equipment, 300 N.C. 286, 266 S.E.2d 812, 814 (1980);

State v. Williams, 300 N.C. 190, 265 S.E.2d 215, 216 (1980);

State v. Benton, 299 N.C. 16, 260 S.E.2d 917, 921 (1980);

State v. Adams, 298 N.C. 802, 260 S.E.2d 431, 432 (1979);

State v. Samuels, 298 N.C. 783, 260 S.E.2d 427, 430 (1979);

Harrington Mfg. Co. v. Cogan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423, 424 (1981);

State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751, 754 (1981);

Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27, 30 (1981);

State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738, 740-741 (1981);

Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880, 882 (1981);

Peoples Serv. Drug Stores v. Mayfair, N.V., 50 N.C. App. 442, 274 S.E.2d 365, 368 (1981);

Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731, 735 (1981);

State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262, 264 (1980);

Oroweat Emp. Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211, 214 (1980);

State ex rel. Utilities Commission v. Springdale Estates, 46 N.C. App. 488, 265 S.E.2d 647, 649 (1980);

Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385, 386 (1980);

Econo-Travel Motor Hotel v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661, 663 (1979);

Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, 791 (1979);

Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69, 69 (1978).

Thank you very much.

Very truly yours,

Barry Nakell

Barry Nakell
Visiting Professor of Law

BN:ag

cc: Mr. Richard N. League
Special Deputy Attorney General
Box 629
Raleigh, NC 27602

Mr. Rex E. Lee
Solicitor General
Department of Justice
Washington, DC 20530

No. 83-218

In The
Supreme Court of the United States
October Term 1983

AMOS REED, etc. and the
ATTORNEY GENERAL OF THE
STATE OF NORTH CAROLINA,

Petitioners,

v.

DANIEL ROSS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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In The
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion below is reported at 704 F2d 705 (4th Cir. 1983) and is printed as Appendix A to the Petition for Writ of Certiorari, pp. 9-16.

JURISDICTION

The jurisdiction of this Court was invoked under 28 USC § 1254(1) within ninety days of the denial of the petition to rehear, May 4, 1983, a copy of which is printed as Appendix B to the Petition for Writ of Certiorari (p. 17).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

U.S. Constitution, Article VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

U.S. Constitution, Article XIV:

"No state . . . deprive any person of life, liberty or property, without due process of law."

(Former) Rules Of Practice In The Supreme Court

19. Transcripts

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than

$5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

21. Exceptions

When appellant is required to serve a case on appeal, he shall set out in his statement of case on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When case on appeal is not required, appellant shall file said exceptions in the office of the clerk of the court below within ten days next after the end of the term at which judgment is rendered from which the appeal is taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complainant does not state a cause of action, or motions in arrest for the insufficiency of an indictment. . . .

(Current) Rules Of Appellate Procedure

Rule 10. Exceptions and Assignments of Error in Record on Appeal.

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported

by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) (2) **Jury Instructions.** . . . No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection. . . . (As Amended effective 1 October 1981).

Rule 28. Briefs: Function and Content.

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

North Carolina General Statutes

§ 15-217. **Institution of proceeding; effect on other remedies.**—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or

of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this Article.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this Article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof. (Repealed effective July 1, 1978.)

§ 15-218. **Contents of petition; waiver of claims not alleged.**—The petition shall identify the proceedings or trial in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and shall clearly set forth the respects in which petitioner's constitutional rights were violated or in which he is illegally detained, and shall state that the questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. The petition shall also identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition. Any claims of substantial denial of constitutional rights or of other error remediable under this Article not raised or set forth in the original or any amended petition shall be deemed waived, unless the court, upon consideration of a subsequent petition, finds a ground for relief

asserted which for sufficient reason was not asserted or was inadequately asserted in the original or amended petition. (Repealed effective July 1, 1978.)

§ **15A-1411. Motion for appropriate relief.**—(a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420. (Effective July 1, 1978.)

• • •

§ **15A-1419. When motion for appropriate relief denied.**—(a) The following are grounds for the denial of a motion for appropriate relief:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(b) Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its

discretion grant the motion if it is otherwise meritorious. (Effective July 1, 1978.)

Federal Rules of Evidence

Rule 201. Judicial Notice of Adjudicative Facts.

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judiical notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

• • •

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

SUMMARY OF ARGUMENT

Appellate procedural defaults should be governed by *Wainwright v. Sykes, supra*, because the most important considerations underlying *Sykes*, comity and relative finality, are equally applicable to defaults occurring in the appellate context. The majority of the circuit courts

have come to this conclusion and, in addition, the Court's repeated emphasis on the role of counsel and the fact that other of counsel's decisions about a case are final and bind the client also demonstrates this. If *Sykes* is applied to this case, novelty of the issues is not an adequate cause to excuse the default, although it has been favorably accepted as such otherwise. This is because the court has already indicated in *Engle v. Isaac, supra,* fn. 39, that the issues Ross raises were not novel in 1969. This is certainly so in view of the longstanding federal rule on burden of proof in conjunction with the fact that in the 1960's numerous federally guaranteed rights were being made applicable to the states and litigation about burden of proof had resulted in three published decisions the year prior to Ross' trial.

STATEMENT OF THE CASE

Daniel Ross was convicted of murder in the first degree in March 1969 for killing his wife and was given a life sentence (A. 16), although his testimony was that he acted in self-defense (A. 17-19). The instructions in his case apparently placed the burden of proof on him to prove self-defense in one context (A. 23-24) and on the state to prove this in another context (A. 26). The instructions also gave the state the benefit of a presumption on the elements of malice and unlawfulness in the charge on second-degree murder because a deadly weapon had been used (A. 23-24). Ross did not object to these instructions at trial but did not have to under state law at the time in order to have them reviewed on appeal,

State v. Gause, 227 NC 26, 40 SE2d 463 (1946). Additionally, on appeal he did not except to these instructions, as was required, although he did argue that his self-defense instructions were substantively incorrect. The Supreme Court, however, in its opinion generally endorsed the instructions (A. 26-27).

The instructions on self-defense and the presumptions of malice and unlawfulness arguably were unconstitutional under the later cases of *In re Winship*, 397 US 358, 90 S.Ct. 1068, 25 LEd2d 368 (1970) and *Mullaney v. Wilbur*, 421 US 684, 95 S.Ct. 1881, 44 LEd2d 508 (1975). Therefore in 1977, Ross challenged them in a post-conviction petition in state court which was unsuccessful at both the trial and appellate levels. Although currently not a part of the record, the parties request that the Court judicially notice these proceedings (p. A-1, *post*) Reed also requests that Ross' appeal brief on the issue of self-defense be noted.

Following his turndown by the state courts, Ross filed a petition for writ of habeas corpus in federal court, with the state pleading forfeiture because the issues were not raised on appeal (A. 5-10). Ultimately, this position was accepted by the District Court (A. 27); however the Fourth Circuit Court of Appeals, after remand from this Court, *Ross v. Reed*, 456 US 921, 102 S.Ct. 1963, 72 LEd2d 436 (1983), found cause to excuse the forfeiture, holding the instructions would have been novel at the time of Ross' appeal for the reason that Winship had not then been decided. The Court of Appeals then went on to hold for Ross on the substantive issue of whether the instructions violated due process of law by shifting the burden

of proof (Pet. Cert. p. App. 1). Before this Court, Ross has sought review only of the novelty issue.

ARGUMENT

I.

North Carolina's Procedural Bar Against Reviewing In A Post-Conviction Proceeding Issues Which Could Have Been Presented On Appeal Presumptively Was Relied On To Bar Relief To Ross Although The State Court Orders Did Not Expressly Indicate This; And The Materials Necessary For This Determination, While Not A Part Of The Record In This Case, May Be Judicially Noticed.

Ross appealed his conviction and while arguing the instructions on self-defense were erroneous as to substantive content did not make any claim that the burden of proof was put on him wrongly with regard to this or with regard to malice and unlawfulness. Under North Carolina law at that time, *State v. White*, 274 NC 220, 162 SE2d 473 (1968) in conjunction with former NCGS §15-217, 218 and former Rules of Practice in the Supreme Court, 19(3), 21, this meant review of his claim was forfeited in state court, *State v. Abernathy*, 36 NC App. 527, 244 SE2d 696 (1979). The thought behind this was that collateral review is not a substitute for appeal, a view which currently guides habeas review of federal convictions as well, *United States v. Frady*, 456 US 152, 102 S.Ct. 1584, 71 LEd2d 816 (1982).[1]

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[1] Later changes in North Carolina's court rules and statutes carry forth essentially the same distinction, Rules of Appellate Practice 10(a), 28(a), NCGS § 15A-1411, 1419. However, in State v. Bush, 307 NC 152, 297 SE2d 563 (1982), it was not applied.

The procedural bar above presumptively was relied on in state court to adjudicate Ross' claims. Although these proceedings are not currently a matter of record before the Court, it is expected that judicial notice will be taken of them as this is permitted, FRE 201(f); Wright and Miller, *Federal Practice and Procedure*, Sec. 5110; *Green v. Warden*, 699 F.2d 364 (7th Cir.), *cert. denied*, 456 US 994, 103 S.Ct. 2436, 77 LEd2d 1321 (1983); *United States ex rel. Geisler v. Walters*, 510 F.2d 887 (3rd Cir. 1975), *Paul v. Dade County Florida*, 419 F.2d 10 (5th Cir.), *cert. denied*, 397 US 1065, 90 S.Ct. 1504, 25 LEd2d 686 (1970); *Granader v. Public Bank*, 417 F.2d 75 (6th Cir.), *cert. denied*, 397 US 1065, 90 S.Ct. 1503, 25 LEd2d 686 (1970). While the orders at both the trial and appellate levels are silent as to whether procedural or substantive reasons were relied on, the factors identified in *Hayes v. Alabama*, 566 F.Supp. 108 (SD Ala. 1983) for making this determination indicate that the disposition was made on procedural grounds; see also *Edwards v. Jones*, 720 F.2d 751 (2nd Cir. 1983), *Dobbert v. Strickland*, 718 F.2d 1518 (11th Cir. 1983); *Rollins v. Maggio*, 711 F.2d 592 (5th Cir. 1983). These factors include the clarity of state procedural law, *State v. White, supra; State v. Abernathy, supra*, and the fact that its application would be correct here; the presentation of a procedural defense by the state (p. A-7, *post*); the preference for avoiding constitutional questions, *State v. Fincher*, 309 NC 1, — SE2d — (1983); *State v. Smith*, 211 NC 206, 189 SE2d

509 (1937); and the numerous rejections of review after *Mullaney* on the issues Ross raised unless they had been raised on direct appeal.[2]

II.

The Procedural Default Doctrine Of Wainwright v. Sykes, Supra, Should Apply To Appellate Defaults As Some Of The Most Important Previously Articulated Thoughts Underlying It Apply In The Appellate Context. These Include Preventing Stale Retrials And Reducing The Stresses On Federalism. The Majority Of The Circuits Have Accepted This View; And This Court's View Of The Role Of Counsel As Well As The Language Of The Court's Recent Decisions On Forfeiture Indicate It Is The Better Approach.

The procedural bar Reed relies on should require a forfeiture under the Court's decisions. In *Wainwright v. Sykes*, *supra*, the Court held that state procedural forfeiture rules could bar federal habeas relief. While it dealt with trial level defaults, as did its precursers, *Francis v. Henderson*, 425 US 536, 96 S.Ct. 1708, 48 LEd2d 149 (1976) and *Davis v. United States*, 411 US 233, 93 S.Ct. 1577, 36 LEd2d 216 (1973), and left open the question of its application to appellate defaults, these long have been recognized as sufficient to bar further review by this Court

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[2] *State v. Brower*, 293 NC 259, 243 SE2d 143 (1977); *State v. Crowder*, 293 NC 259, 243 SE2d 143 (1977); *State v. Jackson*, 293 NC 260, 247 SE2d 234 (1977); *State v. May*, 293 NC 261, 247 SE2d 234 (1977); *State v. Riddick*, 293 NC 261, 247 SE2d 234 (1977); in comparison with *State v. Hankerson*, 293 NC 260, 247 SE2d 234 (1977); *State v. Sparks*, 293 NC 262, 248 SE2d 339 (1977); *State v. Wetmore*, 293 NC 263, 248 SE2d 338 (1977). For the Court's convenience in review, a specimen of each type of order is included as an addendum to this brief, p. A-8-10, post.

on direct appeal. In light of this, the majority of the circuits have applied *Sykes* to appellate defaults as well, *Evans v. Maggio*, 557 F.2d 430 (5th Cir. 1977); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.), *cert. denied*, 449 US 1004, 101 S.Ct. 545, 66 LEd2d 301 (1980); *Forman v. Smith*, 633 F.2d 634 (2nd Cir.), *cert. denied*, 450 US 1001, 101 S.Ct. 1710, 68 LEd2d 204 (1981); *Myers v. Washington*, 646 F.2d 355 (9th Cir.), *vacated and remanded*, 456 US 921, 102 S.Ct. 1964, 72 LEd2d 436 (1982), decision after remand, 702 F.2d 766 (1983), *Hubbard v. Jeffes*, 653 F.2d 99 (3rd Cir. 1981), *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983). Two circuits do not apply it to appellate defaults, *Berrier v. Eglier*, 583 F.2d 515 (6th Cir.), *cert. denied*, 439 US 955, 99 S.Ct. 354, 58 LEd2d 347 (1978), *Holcomb v. Murphy*, 701 F.2d 1307 (10th Cir. 1983); and one other circuit also leans in this direction, *Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977). At least two groups of decisions from this Court show that the majority approach in the circuits is the right one, although two cases—*Fay v. Noia*, 372 US 391, 83 S.Ct. 822, 9 LEd2d 837 (1963) and *Kaufman v. United States*, 394 US 217, 89 S.Ct. 1068, 22 LEd2d 227 (1969)—do not support it.

The first group consists of those decisions which emphasize the role of counsel in the criminal process. In *McMann v. Richardson*, 397 US 759, 770, 90 S.Ct. 1441, 25 LEd2d 763 (1970) discussing forfeiture by guilty plea, the Court said with regard to legal evaluations:

> In our view, a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and

> therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter not on whether a court would retrospectively consider counsel's advice to be wrong or right, but whether that advice was within the range of competence demanded of attorneys in criminal cases.

The same approach was taken with regard to pretrial investigative decisions in *Tollett v. Henderson*, 411 US 258, 267, 93 S.Ct. 1602, 36 LEd2d 235 (1973). Later the emphasis on the role of counsel was noted by three justices in their concurrences to *Sykes, supra* at 92-93, 94; 94-95; 98-99, in support of its holding; and a year earlier it had also been mentioned in coming to the decision in *Estelle v. Williams*, 425 US 501, 512, 96 S.Ct. 1691, 48 LEd2d 126 (1976). Recently, this same recognition resulted in the decision in *Jones v. Barnes*, — US —, 103 S.Ct. 3308, 77 LEd2d 987 (1983), holding that the matter of which issues to argue on appeal ought to be viewed as counsel's prerogative, putting the issues Ross has raised in the same category as strategic decisions before and during trial.

The second group of cases supporting the extension of *Sykes* to an appellate default context consists of the Court's two recent forfeiture cases, *Engle v. Isaac*, 456 US 107, 102 S.Ct. 1558, 71 LEd2d 783 (1982) and *United States v. Frady*, 456 US 152, 102 S.Ct. 1584, 71 LEd2d 816 (1982), the first of which confirmed a suggestion in footnote eight of *Hankerson v. North Carolina*, 432 US 233, 244, 97 S.Ct. 2339, 53 LEd2d 306 (1977). In *Frady*, there are continual references to failure to raise on appeal the issues involved in his collateral attack, *id.* 158, 162, 164,

165; while in *Isaac*, the Court's language inferentially supports application of *Sykes* to appellate defaults by emphasizing two of the costs in current federal habeas practice—stale retrials and stresses on federalism—each of which costs are as heavy whether appellate defaults or trial defaults are involved. These costs are *Sykes'* strongest considerations and *Forman* and *Ho'comb* while reaching different conclusions both note that they favor the extension of *Sykes* to appellate default.[3]

The extension of *Sykes* to appellate level defaults is certainly correct. This applies its middle ground approach (between *Fay* and its predecessors) to a context where there has already been delay and therefore where the importance of concluding the litigation at that point is even more pressing, while encouraging a more liberal appellate review system by providing an assurance that this alone would not create an additional jeopardy of reversal in federal court, years on down the line. The first

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[3] To these, the Seventh Circuit has added a refinement in noting the effect of *Sumner v. Mata*, 449 US 539, 101 S.Ct. 764, 66 LEd2d 722 (1981) in making it now even more important for a prisoner to avoid state court, *United States ex rel Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983). Further, as a matter of practice in North Carolina, the Supreme Court on direct review is in a much better position to review claims than is a trial judge on collateral review owing to several facets of local practice including the rotation of state court judges and their lack of extensive research support. In addition to these considerations, another long standing body of law, by analogy, supports the resolution Reed urges on the Court. Under the Rules of Decision Act, 28 USC § 632, it has long been held that state time limitations apply to federal actions, and use of a federal forum cannot extend them, see for example *Rawlings v. Ray*, 312 US 96, 61 S.Ct. 473, 85 LEd2d 398 (1940). The limitation of certain issues to appeal is, in effect, a time limitation.

of these would help the judicial institution while the second would help the convicted individual. Moreover, extension of *Sykes* to appellate defaults requires a focus on the whole of the judicial system on which we all count to enforce our constitutional liberties and is in line with numerous realities including the facts that our judicial system never guarantees more than opportunities to persuade; that habeas corpus review is largely a review of procedures; that habeas corpus can be and currently is subject to a number of limitations; that the common good (including that of a prisoner *vis a vis* other prisoners' suits) is enhanced by a procedurally predictable judicial system; that responsibility for one's agents is a fact of adult life; that in a system of limited judicial resources, time must be made for other persons' complaints; and that as serious a consequence as imprisonment is, it does not mean that a person subject to it can be allotted every conceivable procedure to escape it. For these reasons, as well as the authorities above, *Sykes* applies here.

III.

No Cause Exists To Excuse Ross' Procedural Default. His Claim Was Not Novel. Even If Novelty Is Adequate Cause, The Tools For Making His Arguments Had Been Available Since 1961 And Other Defendants Had Been Making Them Since 1968, The Year Before Ross' Trial. Moreover, Even If Novel, The Claims Here Did Not Involve A Miscarriage Of Justice In The Sense Used In The Sykes Case As The Presumptions Of Malice And Unlawfulness Were Justified And The Constitution Permits The Burden Of Proof On Self-Defense To Be Put On An Accused.

The *Sykes* case does not require forfeiture due to every default but leaves open the possibility of showing sufficient cause to excuse it and prejudice from it to keep an issue reviewable. The necessity for showing prejudice is not before the Court because it was conceded below (perhaps erroneously in retrospect).

The Court has not defined cause but the reference to it as a way to prevent a miscarriage of justice, *Sykes* at 91, plus a well-established body of law in other contexts to draw from suggests new law to define it may not necessarily have been contemplated and at least suggests some examples. The inadequacy of the state ground and ineffective assistance of counsel immediately come to mind, closely followed by government prevention and the failure of the state to honor a state procedural rule in a given case. In addition, two new suggestions for cause have been made—novelty in *Isaac,* and failure to honor a reasonable client request in *Barnes*—and it is the former that the Fourth Circuit relied on, a ground also recognized in two other circuits, *Sullivan v. Wainwright,* 695 F.2d 1306 (11th Cir. 1983) and *Myers v. Washington, supra.*

Novelty does not exist here. In *Isaacs,* it spoke of this in context of requiring "extraordinary vision" in recognizing "latent constitutional claims", which were not viewed as the case where similar claims had been litigated earlier. This is Ross' situation for his trial concluded in March 1969; and in footnote 39 of *Isaacs,* the Court noted that three published decisions litigating the constitutionality of burden of proof shifts had been published in 1968, saying the following:

> Even before *Winship,* criminal defendants in courts perceived that placing a burden of proof on the de-

fendants may violate due process. For example, in *Stump v. Bennett*, 398 F.2d 111 (CA8), *cert. denied*, 393 US 1001 (1968), the Eighth Circuit ruled *en banc* that an Iowa rule requiring defendants to prove alibis by a preponderance of the evidence violated due process. The court, moreover, observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law." *Id.* at 122. See also *Johnson v. Bennett*, 393 US 253 (1968) (vacating and remanding lower court decision for reconsideration in light of *Stump*); *State v. Nales*, 28 Conn. Supp. 28, 248 A.2d 242 (1968) (holding that due process forbids requiring defendant to prove "lawful excuse" for possession of house breaking tools).

Moreover, in 1961, this Court decided in *Mapp v. Ohio*, 367 US 643, 81 S.Ct. 1684, 6 LEd2d 1081 that the Fourth Amendment applied to the states. Between the date of that decision and June 1969, nearly every guarantee in the Bill of Rights relating to criminal trials was made applicable to the states. Therefore, during that time it would have been reasonable (though certainly not mandatory) for defense lawyers to argue that a constitutional right to the burden of proof being borne by the government was applicable to the states under the Fourteenth Amendment in view of the substantial literature on this from cases beginning in 1881:

> Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required (cites omitted). Mr. Justice Frankfurter stated that "[i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic procedural content of 'due process.'" Leland v. Oregon, supra, at 802-803, 96 L Ed at 1311 (dissenting

> opinion). In a similar vein, the Court said in Brinegar v. United States, supra, at 174, 93 L Ed at 1889, that "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into the rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

In re Winship, supra, at 362. In light of this, the problems of "extraordinary vision" and the "[objection] to every aspect" which the Supreme Court indicated hesitancy over, *Isaac id.* at 131, are not present here, indicating that Ross' case is not within this possible cause.

Similarly, it is hard to describe Ross' claims in terms of the miscarriage of justice comprehended by *Sykes.* Generally speaking, the presumptions of malice and unlawfulness and use of a deadly weapon are not only rational but often so compelling that all they do is prevent a doubting Thomas approach to the evidence; and the constitutionality of placing the burden of proof on self-defense is determined only by the mechanistic test of whether state law describes its crimes as "unlawful" in setting out their elements.[4] Additionally, in this case, the burden of proof, in the main, was on the state; it was similar to the one in *Isaac* in which no cause was found; it was

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[4] Compare the Fourth Circuit decisions in *Frazier v. Weatherholtz,* 572 F.2d 994 (4th Cir.), *cert. denied,* 439 US 876, 99 S.Ct. 215, 58 LEd2d 191 (1978) and *Wynn v. Mahoney,* 600 F.2d 448 (4th Cir.), *cert. denied,* 444 US 950, 100 S.Ct. 423, 62 LEd2d 320 (1979). The first of these cases holds Virginia's placement of the burden of proof on the accused with regard to self-defense constitutional while the second holds that North Carolina's placement is unconstitutional.

similar with regard to self-defense to the allocation of the burden on insanity which may be constitutionally put on a defendant, *Rivera v. Delaware,* 429 US 877, 97 S.Ct. 226, 50 LEd2d 160 (1976); and it was dissimilar from *Mullaney* with regard to the presumptions from use of a deadly weapon.

Several reasons appear why novelty and cause were spoken of in such restrictive terms in *Isaac* and *Sykes.* First, novelty has a possibility of being refined into an exception which can eat up a lot of the rule. The Fourth Circuit already has moved the proposed end of novelty from 1968 to mid-1970 in this case and some court presumably could try to move it to mid-1975 when *Mullaney* was decided. Second, the Fourth Circuit's apparent refusal to honor this Court's plain language in *Isaac* shows what all lawyers know—that precedents are worth challenging because they only have the value judges are willing to give them and the ambiguity of the English language in some cases and its precision in others along with varying fact situations give lawyers a lot of leeway to argue. Finally, the fact that precedent limits the odds of success on a particular issue is not the only consideration in deciding on appellate arguments. A sense of right figures in, as does a sense of aggrievement. A sense of challenge figures in; as does a sense of necessity. This is shown generally by the fact that convicted criminals still appeal even though the government wins the overwhelming number of appeals; and it is shown in this particular case by the fact that in the District Court, novelty did not stop the undersigned from successfully trying to change the law; and in the Fourth Circuit, it did not stop Mr. Ross' lawyer from successfully challenging this Court's apparent decision in *Isaac.*

Moreover, even where a novel claim is involved, this Court has suggested a possible answer to the question of whether or not novelty is sufficient to show cause by referring to Mr. Justice Harlan's separate opinion in *Mackey v. United States,* 401 US 667, 675-702, 91 S.Ct. 1160, 28 LEd2d 404 (1971). There, he urges that generally the strongest factors in making a decision on retroactivity (a parallel to the situation involved here) are the interests of finality as being helpful to both society and the prisoner, with the latter's interest being in an acceptance of conviction, though possibly wrong, which frees him to shift his energy toward the future; the drain on limited criminal resources that retrial entails when others have not been tried initially; the fact of staleness (here 13 years) which often means as unreliable result from a second trial as from the first. All these would apply here to support respondent's position. Although Mr. Justice Harlan offered as an exception to the above one which might be considered to undercut Reed's position—the situation where procedures did not include those things implicit in the concept of ordered liberty, with burden of proof possibly being so implicit, as noted two paragraphs above, on the facts of this case the burden of proof was adequate to meet the above tests.

CONCLUSION

In conclusion, Daniel Ross failed to utilize the sole remedy for review of his claim under state law, appeal this presumptively was relied on to deny him collateral relief in state court, which, in turn, required a forfeiture

in federal court under *Wainwright v. Sykes*, 433 US 72, 97 S.Ct. 2497, 53 LEd2d 594 (1977), unless cause to excuse it and prejudice from the claim were shown. Cause was not shown, even if prejudice was. Therefore, the Court of Appeals should be reversed.

Respectfully submitted this 27 day of January, 1984.

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ADDENDUM

REQUEST FOR JUDICIAL NOTICE

The parallel state proceedings in this case were not made a part of the record below. The parties request that judicial notice be taken of them. Reed also requests the appeal briefs in the North Carolina Supreme Court be judicially noticed. Parts of the above are excerpted in this section and the items in full will be filed with the Court, under seal, for the Court's further inspection. The parties believe that judicial notice is permitted by FRE 201(f).

EXCERPT FROM DEFENDANT'S BRIEF IN THE NORTH CAROLINA SUPREME COURT

(10) The Court below erred in failing to apply the law to the evidence as required by North Carolina GS 1-180, in that it did not properly charge the jury as to the doctrine of self-defense, said doctrine of self-defense being asserted by the defendant, i.e., that the defendant was in a place where he had a legal right to be; that the defendant was without fault in bringing on the difficulty; that the deceased had ill will toward him; and that the deceased advanced on him and stabbed him.

EXCEPTION NO. 16 (R. p. 38).

If a felonious or murderous assault is made upon a person who is without fault, he is not required to retreat, but may stand his ground and kill his assailant if need be. State v. Thornton, 211 NC 413, 190 SE 758. And evidence tending to show that the defendant was where he was entitled to be, and was without fault in bringing on

and entering into the difficulty, and the deceased had ill will toward him and was advancing upon him at a distance of 10 to 12 feet with an open knife, is sufficient under this principle. *State v. Guss,* 254 NC 349, 118 SE 2d 906.

The Court failed to charge the jury that if excessive force or unnecessary force is used in self-defense, the defendant is guilty of manslaughter at least. *State v. Mosley,* 213 NC 304, 195 SE 830.

The Court failed to relate the doctrine of self-defense to the evidence in that the defendant asserted the doctrine as to the deceased as well as Leon Young and Charles McAllister. The Court further failed to instruct the jury that if they believed that the defendant shot at the deceased and at Leon Young and Charles McAllister in self-defense, he would be entitled to an acquittal.

EXCERPTS FROM WRIT FILED 2 DECEMBER 1978

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA
COUNTY WAKE

DANIEL ROSS,

Relator,

v.

L. V. STEVENSON, Superintendent of Calendonia Prison Farm, Tillery, N. C. 27887,

DISTRICT ATTORNEY for the Tenth Judicial District Wake County Superior Court,

Respondents.

PETITION FOR A WRIT OF
POST-CONVICTION REVIEW

No. _____

• • •

5. Relator is presently restrained unlawfully because the State of North Carolina has NOT proven that:

• • •

(b) That the prosecution proved self-defense beyond a reasonable doubt under North Carolina law;

(c) The instructions did not place the burden on relator to persuade the jury that the relator was not guilty by proving that the killing was not unlawful;

EXCERPTS FROM ORDER ON WRIT FILED
2 DECEMBER 1978

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File # 70 CR 44248

STATE OF NORTH CAROLINA
COUNTY OF WAKE

STATE OF NORTH CAROLINA

vs.

DANIEL ROSS

O R D E R

• • •

The record reveals the following:

1. That petitioner was tried in Wake Superior Court on March 19, 1969 on a charge of murder in the first degree; a guilty verdict was returned and the petitioner sentenced to the State Prison for the remainder of his natural life; the petitioner appealed to the North Carolina Supreme Court; and the judgment of the North Carolina Supreme Court dated October 28, 1969 found no error; Order affirming prior decision received from the Supreme Court denying Petition for Writ of Certiorari dated May 14, 1970.

2. Order marked Order of Court of Appeals denying Petition for Writ of Certiorari dated July 11, 1973.

3. Order of Judge McKinnon giving credit dated March 5, 1974.

4. Petition for Writ of Post-Conviction dated May 10, 1974 along with an Order of Judge McKinnon dated May 29, 1974 denying and dismissing said petition.

And the Court having considered the petition with the record in the case is of the opinion that it states no grounds for relief under the post-conviction review act.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petitioner's petition be, and the same is hereby denied and dismissed;

EXCERPT FROM PETITION FOR WRIT OF CERTIORARI TO REVIEW DISMISSAL OF WRIT FILED 2 DECEMBER 1978

2. The court, in its charge, placed upon the petitioner burdens of proof later held by the United States Supreme Court to be violative of the due process clause of the Fourteenth Amendment, *Mullaney v. North Carolina*, 421 U. S. 684, 95 S. Ct. 1881, 43 L. Ed. 2d 508 (1966) which ruling was given retroactive effect in *Hankerson v. North Carolina*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 306 (1977), and appears at (Rp. 42).

3. Due process requires the prosecution to disprove self-defense beyond a reasonable doubt under North Carolina law. The Court, in its charge, to the jury that the State makes a contention in connection with the assault which the petitioner *contends* his wife made upon him that you should not find that she made any assault on him; and that if there is any evidence that you accept as true with respect to his having suffered an injury on his neck and later received treatment for that in a Virginia Hospital, that it was an injury that produced himself in order to set up a defense, which the State *contends* you should not accept (Rp. 48). This charge permitted the jury to reach a different legal conclusion in petitioner's case from that which they might reach in another case presenting identical facts, under *Mullaney v. Wilbur*, 421 U. S. 684 (1975); *Ivan v. City of New York*, 407 U. S. 203 (1972); *Hankerson v. North Carolina*, No. 75-65 — U.S. — (1977).

EXCERPT FROM STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO REVIEW DISMISSAL OF WRIT FILED 2 DECEMBER 1978

4.

Petitioner now seeks a writ of certiorari from the North Carolina Court of Appeals for further review in this matter. Petitioner contends that the trial court erroneously instructed the jury, in violation of the decision in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975). Allegations relating to jury instructions should have been raised on direct appeal. Assertions which were made or could have been made on direct appeal cannot be asserted or reasserted in post-conviction proceedings. *State v. White*, 274 N.C. 220 (1968). Petitioner has also submitted several previous petitions for post-conviction review in which he could have raised this issue. N.C.G.S. 15-218 prohibits raising a ground in a successive petition which could have been raised earlier, and any claims not alleged in previous petitions are deemed waived. *State v. Green*, 2 N.C. App. 391 (1968). Therefore, petitioner is not entitled to the relief he is now seeking.

ORDER ON WRIT OF CERTIORARI

NO. 78SC17PC

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

v

DANIEL ROSS

County: Wake
Number: 70CRS44248

ORDER
(Filed February 24, 1978)

The following Order was entered:

"The petition filed in this cause on the 9th day of January, 1978, and designated Petition for Writ of Certiorari is denied by order of the Court in conference. This the 23rd day of February, 1978."

The above order is therefore certified to the Clerk of the Superior Court in Wake County, North Carolina.

Witness my hand and official seal this the 24th day of February, 1978.

/s/ Francis E. Dail
Clerk of the Court of Appeals

No. 27 PC

STATE OF NORTH CAROLINA

v.

BROWER AND JOHNSON

ORDER DENYING MOTION FOR RECONSIDERATION

INASMUCH as defendants did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state, *see State v. Brower & Johnson*, 289 N.C. 644 (1976), they have waived their right now to complain about such errors. *Hankerson v. North Carolina*, — U.S. —, 53 L.Ed. 2d 306, 316, n. 8 (1977). Now, therefore, it is

ORDERED by the Court in Conference that defendants' motion for reconsideration be and it is hereby denied.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

No. 90

STATE OF NORTH CAROLINA

v.

KELLY DEAN SPARKS

ORDER FOR NEW TRIAL UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

HAVING reconsidered this case on remand from the Supreme Court of the United States in the light of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975), and *Hankerson v. North Carolina*, — U.S. —, 53 L.Ed. 2d 306 (1977), the defendant having properly raised on appeal to this Court the question of the constitutionality of the trial

judge's instructions placing the burden on the defendant to show that the killing was done in the heat of a sudden passion and that it was done in self-defense, *see State v. Sparks*, 285 N.C. 631 (1974), and being of the opinion that in light of *Mullaney* and *Hankerson*, these assignments of error should have been sustained and defendant awarded a new trial, now, therefore, it is

ORDERED by the Court in Conference that defendant be and he is hereby awarded a new trial.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

No. 83-218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMOS REED, *et al.*,

Petitioners,

v.

DANIEL ROSS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Ross should be denied federal habeas corpus relief from his concededly unconstitutional and unreliable state conviction because he did not raise the constitutional issue on appeal, even though the reason that he did not do so was that the law establishing the constitutional principle had not yet begun to develop and was therefore effectively unavailable at the time of his appeal,* and even though the state courts had not refused on the procedural ground to decide the issue in Ross' cases or in the cases of other defendants who had also failed timely to raise the issue on appeal.

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*The State and the Solicitor General state the Question in terms of whether the constitutional issue was "novel" at the time of Ross' appeal. That shorthand reference is misleading, however. The issue was not even novel at that time. The foundation principle had not yet been decided, and no counsel or court had perceived or begun to litigate the issue.

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SUMMARY OF ARGUMENT

Although Ross was convicted at an unfair trial in which due process violations substantially impaired the truth-finding process, the State contends that his conviction should be upheld simply because he did not raise the issue on appeal, even though under state law the issue was adequately preserved at trial, even though he did appeal, even though the State Supreme Court did consider the burden of proof instructions on its own motion, even though the State Supreme Court has overlooked and the State has waived the failure to raise the issue on appeal in similar cases, even though the law establishing the violation had not yet begun to develop and the principle upon which it was based was not yet available or being urged, and even though Ross did raise the issue in the state courts as soon as this Court decided it and held that it applied retroactively. That contention is not supported by any federally cognizable policy or any legitimate state interest.

ARGUMENT

I.

ROSS COMMITTED NO PROCEDURAL DEFAULT IN THE STATE COURTS ADEQUATE TO JUSTIFY DENIAL OF FEDERAL HABEAS CORPUS.

In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), this Court held that federal habeas corpus review of a state conviction may be denied if the petitioner failed to comply with a state procedural rule at trial, see *Engle* v. *Isaac*, 456 U.S. 107, 110 (1982), if that failure constitutes an adequate and independent state ground on the basis of which the state courts denied relief.[1] 433 U.S. at 81. The first questions, therefore, are (a) whether the state had such a rule, (b) whether the rule was consistently enforced by imposing a forfeiture, and (c) whether the state courts invoked

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[1] Unless the petitioner shows "cause for and actual prejudice from the default." *Engle* v. *Isaac*, 456 U.S. 107, 110 (1982). See Argument II.

the procedural forfeiture in Ross' case. 433 U.S. at 85; see also, *Engle* v. *Isaac*, 456 U.S. at 125 n.27; *Jenkins* v. *Anderson*, 447 U.S. 231, 234-235 n.1 (1980); *Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980); C. Wright, LAW OF FEDERAL COURTS 343 (West 1983); L. Yackle, POSTCONVICTION REMEDIES 95-96 (1983 Cum. Supp.).

A. Ross Committed No Procedural Default At Trial

This case presents no issue of a failure to comply with a state contemporaneous objection rule. At the time of Ross' trial, North Carolina law did not require an objection to an erroneous instruction, including an erroneous instruction on the burden of proof. *State* v. *Johnson*, 227 N.C. 587, 589, 42 S.E.2d 685, 686 (1946); *State* v. *Gause*, 227 N.C. 26, 30, 40 S.E.2d 463, 466 (1946); see Brief for Pet. 8.

B. The North Carolina Supreme Court Decided The Burden Of Proof Issue On The Merits On Ross' Appeal

Ross appealed his conviction to the North Carolina Supreme Court. On that appeal, Ross challenged the instructions at his trial but not specifically on the burden of proof issue.

Rule 10 of the North Carolina Rules of Appellate Procedure then provided: "(T)he scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal . . . ." The North Carolina Supreme Court has, however, reviewed the correctness of instructions despite the failure of the defendant properly to make that issue the basis of an assignment of error in the record on appeal. *E.g.*, *State* v. *Freeman*, 295 N.C. 210, 244 S.E.2d 680, 689 (1978) ("Notwithstanding defendant's failure to comply with this rule, we have carefully examined the charge and we find it to be entirely adequate on proximate cause."); *State* v. *Riggsbee*, 285 N.C. 708, 208 S.E.2d 656, 662 (1974) ("Despite the failure of the defendant to set out what the court should have charged, we have carefully examined the entire charge."). Indeed, it did exactly that on Ross' appeal, holding: "The court charged fully and correctly on the burden

and intensity of the proof required to support each of the permissible verdicts of guilty. . . . While the defendant did not point out and assign as error any particular or designated portion of the charge as required by appellate rules, we have examined the charge and conclude it is in accordance with legal requirements and is unobjectionable." *State* v. *Ross*, 275 N.C. 550, 554, 169 S.E.2d 875, 878 (1969).

"(I)f the state courts have entertained the federal constitutional claims on the merits in a subsequent proceeding, . . . the federal courts have no discretion to deny the applicant habeas relief to which he is otherwise entitled." *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975). If the state courts are not concerned about a procedural default, "a federal court implies no disrespect for the State by entertaining the claim." *Ulster County Court* v. *Allen*, 442 U.S. 140, 154 (1979); *accord*, *Connecticut* v. *Johnson*, 103 S. Ct. 969, 974 n.8 (1983); *Engle* v. *Isaac*, 456 U.S. 107, 135 n.44 (1982) ("If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review."); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Mullaney* v. *Wilbur*, 421 U.S. 684, 688 n.7 (1975); see also, *Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967); *Harlin* v. *Missouri*, 439 U.S. 459, 459 (1979); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974) ("But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice."); *NAACP* v. *Alabama*, 377 U.S. 288, 296-301 (1964); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); *Brown* v. *Allen*, 344 U.S. 443, 486 (1953); *Darr* v. *Burford*, 339 U.S. 200, 203 (1950); *Hawk* v. *Olson*, 326 U.S. 271, 278 (1945); *Herndon* v. *Lowry*, 301 U.S. 242, 247 (1937); *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936).

That doctrine applies to the present case. Because the State Supreme Court decided not to impose a procedural bar, the State may not insist on one in the federal courts. The critical

circumstance is that the state court considered the *issue*, *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976), even though it obviously did not consider the precise *argument* because *Mullaney* v. *Wilbur* had not yet been decided. The procedural failure cannot constitute an independent and adequate state ground for the state court's decision denying Ross relief; it was not a ground for the decision at all. See *Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980); *Hockenbury* v. *Sowders*, 620 F.2d 111, 115 (6th Cir. 1980).

C. The North Carolina Superior Court, And Probably The North Carolina Court Of Appeals As Well, Decided The Burden Of Proof Issue On The Merits On Ross' Post-Conviction Petition.

The State for the first time in this Court has claimed that the state courts "presumptively" denied Ross' post-conviction petition on the basis of his failure to raise the issue on appeal. Brief for Pet. 11, 21. The post-conviction trial court, however, expressly decided the petition on the merits, and the appellate court denied the petition without explanation.

Ross pursued his post-conviction petition without the assistance of counsel. Brief for Pet. A-3 to A-8. The trial court denied the petition on the merits on December 29, 1977, saying: "And the Court having considered the petition with the record in the case is of the opinion that it states no grounds for relief under the post-conviction review act." Brief for Pet. A-5. At that time, the only avenue for review of such a denial was a petition for discretionary review in the State Court of Appeals. When Ross sought such review, the State opposed his petition on the ground that he had not raised the issue on appeal. Brief for Pet. A-7. The State Court of Appeals denied certiorari on February 24, 1978 by a summary order, without explaining any basis for its action. Brief for Pet. A-8.

The State's request that the Court presume that the decisions were based on a procedural bar is contrary to the approach preferred by this Court in an analagous situation in *Michigan* v. *Long*, 103 S. Ct. 3469 (1983). In that case, the

Court said that when the decision of a state court "fairly appears to rest on federal law . . . and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 3476. That approach is particularly appropriate here because the State Supreme Court had decided the issue on Ross' appeal, because—as discussed on pages 6-8—the state courts entertained this issue on the merits in other cases despite the same procedural default, because the post-conviction trial court did decide the merits, and because the State did not raise the procedural issue until the case was before the State Court of Appeals, when Ross was not represented by counsel and not given an opportunity to respond. *Ulster County Court* v. *Allen*, 442 U.S. 140, 149-154 (1979); see L. Yackle, POSTCONVICTION REMEDIES 98 (Cum. Supp. 1983). This is a question of state law, and this Court should not be asked to write state law where the state courts have not done so.

D. The North Carolina Courts Have Not Regularly Or Consistently Imposed A Forfeiture For Failure To Raise The Burden Of Proof Issue On Appeal Before *Mullaney* Was Decided.

This Court recently summarized: "Our decisions . . . stress that a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-263 (1982). See also, *Williams* v. *Georgia*, 349 U.S. 375, 383 (1955) ("A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.")

(1) The cases in which the North Carolina courts have not imposed a forfeiture.

(a) *On appeal.* In *State* v. *Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd on other grounds sub nom. Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), the North Carolina Supreme Court entertained the *Mullaney* issue on the merits on appeal despite the defendant's failure to raise it in his record on appeal, filed shortly before *Mullaney* was decided. Hankerson was convicted of murder in November, 1974, after instructions that violated the later decision in *Mullaney*. He appealed to the North Carolina Court of Appeals, but did not make any exception to the burden of proof instructions an assignment of error in the record on appeal. *Id.* That court affirmed the conviction without discussing the burden of proof issue, but with one judge dissenting on a different ground. *State* v. *Hankerson*, 26 N.C. App. 575, 217 S.E.2d 9, 12 (1975). That dissent entitled Hankerson to an appeal to the North Carolina Supreme Court. 220 S.E.2d at 578. This Court decided *Mullaney* on June 9, 1975. Hankerson filed his appeal in the North Carolina Supreme Court on July 31, 1975, still without raising the burden of proof issue. *Id.* On August 19, 1975, Hankerson moved to add the *Mullaney* issue to his appeal. *Id.* The North Carolina Supreme Court allowed that motion on September 2, 1975, one week before oral argument. Thus, the North Carolina Supreme Court sensibly entertained the *Mullaney* issue on the merits in Hankerson's appeal despite Hankerson's failure timely to raise it in the record on appeal.

(b) *On the former post-conviction procedure.* From 1951 until 1978 North Carolina post-conviction proceedings were governed by sections 15-217 through 15-222 of the North Carolina General Statutes. *State* v. *Bush*, 307 N.C. 152, 297 S.E.2d 563, 572 (1982); Note, 55 N.C. L. Rev. 653, 660 n.53 (1977). That covered the time of Ross' trial, his appeal, and his post-*Mullaney* petition for post-conviction relief. That law provided collateral review in the following circumstances:

> "Any person imprisoned . . . who asserts that in the proceedings which resulted in his conviction there was a

> substantial denial of his rights under the Constitution of the United States . . . may institute a proceeding under this Article."

N.C. Gen. Stat. § 15-217 (repealed 1977); see 55 N.C. L. Rev. at 660-661 n. 53.

The first decision interpreting that provision was *Miller* v. *State*, 237 N.C. 29, 74 S.E.2d 513 (1953), *cert. den.*, 345 U.S. 930 (1953). The court said the provision was

> "enacted to provide an adequate and available post-trial remedy for persons imprisoned under judicial decrees who suffered substantial and unadjudicated deprivations of their constitutional rights in the original criminal actions because they were prevented from claiming such constitutional rights in the original criminal actions by factors beyond their control."

74 S.E.2d at 528-529. The proceeding was designed to provide review, not of ordinary objections or evidentiary issues but "only in those instances in which a substantial denial of a constitutional right has been made to appear." *State* v. *Cruse*, 238 N.C. 53, 76 S.E.2d 320, 324 (1953). Even if the defendant did not appeal, he could file a post-conviction petition in order to have the state courts inquire into "whether there was a *substantial denial*" of his constitutional rights. *Branch* v. *State*, 269 N.C. 642, 153 S.E.2d 343, 346 (1967); *State* v. *Graves*, 251 N.C. 550, 112 S.E.2d 85, 89 (1960); *State* v. *Hackney*, 240 N.C. 230, 81 S.E.2d 778, 783 (1954).

In 1968, in *State* v. *White*, 274 N.C. 220, 162 S.E.2d 473 (1968), the North Carolina Supreme Court reaffirmed that

> "The Post-Conviction Act provides every defendant adequate opportunity for the adjudication of claimed deprivations of constitutional rights which prevented him from obtaining a fair trial, provided factors beyond his control prevented him from claiming them earlier."

162 S.E.2d at 479. Nevertheless, relying on *In re Sterling*, 63 Cal.2d 486, 47 Cal. Rptr. 205, 407 P.2d 5 (1965), which provided a state equivalent of *Stone* v. *Powell*, 428 U.S. 465 (1976), the Court refused post-conviction review on a search-and-seizure

issue, saying: "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." 162 S.E.2d at 480.

The North Carolina Supreme Court has granted relief on the *Mullaney* issue in at least one post-conviction petition despite the failure of the petitioner in that case to have included the issue in his record on appeal. *State* v. *Hancock*, in the Joint Appendix at 12.[2] Hancock raised the issue for the first time on his discretionary appeal to the North Carolina Supreme Court, after failing to comply with Rule 10 by raising it on his first appeal to the North Carolina Court of Appeals, and was denied relief. On his post-conviction petition on the same issue, however, the State Supreme Court granted Hancock a new trial.

(c) *On the current post-conviction procedure.* Effective July 1, 1978, but applicable "without regard to when a defendant's guilt was established or when judgment was entered against him," *State* v. *Bush*, 297 S.E.2d at 572, North Carolina replaced its Post-Conviction Hearing Act with a Motion For Appropriate Relief, N.C. Gen. Stat. §§ 15A-1411 through 15A-1422. See page 41. The North Carolina Supreme Court has reviewed on the merits on a Motion for Appropriate Relief at least one case raising the *Mullaney* issue. *State* v. *Bush*, *supra;* see Brief for Pet. 10 n.1. In that case, the defendant was convicted during the month before *Mullaney* was decided, but his appeal came after *Mullaney*, and he did not raise the issue. In reaching the issue on his motion for appropriate relief the Court did not even discuss the procedural failure. Thus, it would appear that Ross' failure to specify the burden of proof issue in his record on appeal would not preclude him from raising it under the Motion for Appropriate Relief proceeding.[3]

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[2] This decision was unpublished. Respondent is unaware whether there are other such decisions in this category.

[3] Having exhausted his state remedies by presenting this issue to the state courts under the Post-Conviction Hearing Act, if not on

(2) The cases in which the North Carolina courts have imposed a forfeiture.

In a series of identical brief orders shortly after this Court's decision in *Hankerson*, the North Carolina Supreme Court denied motions for reconsideration filed by defendants whose cases had already been decided on appeal, and who were seeking for the first time to raise the *Mullaney* issue. *State* v. *Riddick*, 293 N.C. 261, 247 S.E.2d 234 (1977); *State* v. *May*, 293 N.C. 261, 247 S.E.2d 234 (1977); *State* v. *Jackson*, 293 N.C. 260, 247 S.E.2d 234 (1977); *State* v. *Crowder*, 293 N.C. 259, 243 S.E.2d 143 (1977); *State* v. *Brower*, 293 N.C. 259, 243 S.E.2d 143 (1977). In each case, the Court explained its rationale as follows:

> "Inasmuch as defendant did not assign as error on appeal . . . he was waived his right now to complain about such errors. *Hankerson* v. *North Carolina*, 432 U.S. 233, 244, n.8 (1977)."

The noteworthy aspect of those decisions is that they cited no North Carolina authority. Instead, they cited only the dictum in footnote 8 of this Court's decision in *Hankerson:* "The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson* v. *North Carolina*, 432 U.S. at 244 n.8. That footnote did not, however, purport to establish a federal rule of forfeiture for state courts. Presumably, it referred to the *Wainwright* v. *Sykes* adequate and independent state ground doctrine, which would honor any state-law based forfeiture subject to the cause-and-prejudice exception. The forfeiture must be provided by state law, however, see *Rezin* v. *Wolff*, 439 U.S. 1103 (1979) (White, J., dissenting from denial of certiorari), and the North Carolina Supreme Court invoked no state law in support

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appeal, Ross is not required to present it to them again under the new Motion for Appropriate Relief procedure before being able to pursue it on federal habeas corpus. *Francisco* v. *Gathright*, 419 U.S. 59, 62 (1974); *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971).

of its rulings. No North Carolina court did so until the North Carolina Court of Appeals issued its published opinion on June 6, 1978 in *State* v. *Abernathy*, 36 N.C. App. 527, 244 S.E.2d 696 (1978), three and one-half months after it summarily rejected Ross' post-conviction petition.

(3) These cases confirm that the North Carolina courts decided Ross' post-conviction petition on the merits and that the North Carolina courts have not regularly imposed a procedural forfeiture on this issue.

Hankerson, *Hancock* and *Bush* demonstrate that Rule 10 is not regularly enforced by a forfeiture. Moreover, in *Wynn* v. *Mahoney*, 600 F.2d 448 (4th Cir.), *cert. den.*, 444 U.S. 950 (1979), North Carolina waived the procedural bar that it now chooses to assert. As the Fourth Circuit noted in that case: "We have no occasion to decide the *Wainwright* question since North Carolina explicitly waived that point in oral argument of this appeal." *Id.* at 450 n.1.

The State has attempted to distinguish *Hankerson* and *Hancock* on the ground that those defendants raised the issue while their cases were still pending on appeal, although not in timely fashion. Brief for Pet. 12. That explanation takes no account of *Bush* or of the State's waiver of the procedural bar in *Wynn* v. *Mahoney*. Moreover, it overlooks the fact that both the North Carolina appellate rules and the *Hankerson* principle of retroactive application of *Mullaney* accord no significance to raising an issue in the twilight of the appeal stage rather than the dawning of a post-conviction challenge. Rule 10 required the issue to be "made the basis of assignments of error in the record on appeal." The North Carolina Supreme Court did not enforce that rule by a forfeiture in *Hankerson*, *Hancock* or *Bush*. There is no equitable basis for imposing against Ross a procedural bar that was expressly not applied against Hankerson, Hancock, Bush or Wynn when they were similarly situated. Moreover, this Court held that *Mullaney* is fully retroactive, not just to cases still pending on appeal. *Cf.*, *United States* v. *Johnson*, 457 U.S. 537, 562, 562 n.21 (1982).

II.

THE COURT OF APPEALS CORRECTLY HELD THAT, CONSIDERING ALL THE CIRCUMSTANCES, ROSS DEMONSTRATED CAUSE FOR HIS FAILURE TO CHALLENGE THE BURDEN OF PROOF INSTRUCTIONS ON HIS PRE-*WINSHIP* APPEAL SO THAT HE WAS ENTITLED TO FEDERAL HABEAS CORPUS RELIEF FROM HIS CONSTITUTIONALLY UNRELIABLE CONVICTION.

A state petitioner may obtain federal habeas corpus relief despite a procedural default if he shows "cause for and actual prejudice from the default." *Engle* v. *Isaac*, 456 U.S. at 110; *Wainwright* v. *Sykes*, 433 U.S. at 87, 90-91. The "cause" prong of that standard may be satisfied by a single circumstance such as, in this case, that the constitutional principle developed only after the time that the petitioner was required to raise the issue. The "cause" analysis may also take account of all the circumstances in the case. The Court of Appeals employed that approach in this case.

A. The Constitutional Violation Substantially Impaired The Truth-Finding Process At Ross' Trial.

The trial court's instructions imposing on Ross rather than the prosecution the burden of persuasion on the issues of malice and self-defense denied Ross due process of law. *Mullaney* v. *Wilbur, supra; State* v. *Hankerson*, 220 S.E.2d at 584; see also, *Engle* v. *Isaac*, 456 U.S. at 122. In *Hankerson* v. *North Carolina*, this Court said that the constitutional prohibition against shifting this burden of proof to the defendant "was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.' " 432 U.S. at 242. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). "[T]he reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error.' " *Ivan V.* v.

New York, 407 U.S. 203, 204 (1972). The constitutionally erroneous instruction by the trial court " 'raises *serious* questions about the accuracy' " of the jury's verdict. *Hankerson* v. *North Carolina*, 432 U.S. at 243.

In *Engle*, this Court held that *Sykes* applies to issues relating to the truthfinding function. 456 U.S. at 129. Nevertheless, the Court added that "the nature of a constitutional claim may affect the calculation of cause and actual prejudice." *Id.*; see also, *Rushen* v. *Spain*, 104 S. Ct. 453, 458-459 (1983) (Stevens, J., concurring); *Rose* v. *Lundy*, 455 U.S. 509, 544, 546-547, 548 n.17 (1982) (Stevens, J., dissenting); *Wainwright* v. *Sykes*, *supra* at 96 (Stevens, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 479 (1976); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 257-258 (1973) (Powell, J., with Burger, C. J. and Rehnquist, J., concurring); *Kaufman* v. *United States*, 394 U.S. 217, 234, 235-236 (1969) (Black, J., dissenting); *Price* v. *Johnston*, 334 U.S. 266, 291 (1948). In *Wainwright* v. *Sykes*, the Court expressed confidence that this procedural obstacle will not prevent the federal courts from using habeas corpus to protect a defendant who would otherwise be "the victim of a miscarriage of justice." 433 U.S. at 91. In *Engle*, the Court agreed "that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." 456 U.S. at 135. The State has conceded that Ross suffered prejudice at his trial from the constitutional violation. See Brief for Pet. 17; Brief for United States 4.

B. The Unavailability Of A Constitutional Claim Because The Precedential Tools For Constructing It Had Not Yet Begun To Develop Constitutes "Cause" For The Failure Timely To Raise The Claim.

Counsel plays an important role in the adversary system. Proper functioning of that system requires committing the conduct of the defense to counsel in consultation with the defendant. See *Jones* v. *Barnes*, 103 S.Ct. 3308, 3313 and n.6 (1983); *Wainwright* v. *Sykes*, *supra* at 92, 93-94 (Burger, C. J., concurring); *id.* at 98 (White, J., concurring). Institutional

necessities mean that defendants are often bound by the actions and judgments of their attorneys. Litigation cannot be replayed to test alternative strategies. Thus, tactical decisions by defense counsel cannot be "cause" for the failure to pursue a different course. *Gardner* v. *Florida*, 430 U.S. 349, 361 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 514-515 (1976); *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972); *Sunal* v. *Large*, 322 U.S. 174, 181 (1947). That standard situation, where counsel makes decisions that are committed to his or her responsibility, occupies the expansive middle ground in the spectrum of procedural failures diagrammed in Exhibit A. At one extreme are cases in which the attorney acts or fails to act as a result of (i) incompetence, (ii) gross negligence, or (iii) inadvertence, negligence, or lack of due diligence. The quality of the criminal defense bar has not yet reached the stage where the courts can totally ignore the hardships of defendants who stand to lose important constitutional rights as a result of the ineffective assistance of counsel. See generally, *Carrier* v. *Hutto*, ___ F.2d ___ (4th Cir. 1983). That is not the issue in this case, however.

The problem in this case arises at the other end of the spectrum: Ross failed to raise the constitutional issue because it was not yet available; not even the precedential tools to construct it had yet been developed. He and his attorney made no judgment about the issue; they were understandably unaware that there was an issue to decide about. The State makes no claim that they gave it any thought or that they entertained any strategic or tactical considerations. In this situation, counsel is not a meaningful safeguard. Therefore, the unconstitutionally severe hardship to Ross cannot be overlooked simply because he had counsel.

The Solicitor General argues that the contemporary unavailability of a later decision establishing a new constitutional principle that is retroactively applicable should never constitute "cause." Brief for United States 17. That position ignores the unanimous support for this basis for "cause" in several decisions of this Court, the opinions of other courts,

considerable scholarly commentary, analogous provisions of the Federal Rules, and even the Administration's legislative proposals that have recently passed in the Senate.

(1) *The decisions of this Court.* In *Engle*, this Court suggested that a change in the law might constitute "cause" for the failure of a criminal defendant to raise the claim before the law had developed "the tools to construct their constitutional claim." 456 U.S. at 133. The Court did not decide that question, however, because it found that "respondents' claims were far from unknown at the time of their trials." 456 U.S. at 131. In *Wainwright* v. *Sykes*, Justice White, in a concurring opinion, wrote that "ignorance of the applicable rules . . . would be sufficient to excuse the failure to object to evidence offered during trial." 433 U.S. at 99; see also, *id.* at 98 ("if counsel is aware of the facts and the law"). The circumstance that the applicable law had not yet begun to develop is the most reasonable explanation for counsel to be unaware of it.

Several decisions of this Court have recognized that it would be improper to deny a retroactive new constitutional decision to a litigant because of failure to assert it before it was reasonably available. Those pronouncements were not made pursuant to the cause-and-prejudice test. Their perception of the equities in the treatment of a retroactive change in the law, however, is equally applicable today.

The most recent instructive statement by this Court came in *O'Connor* v. *Ohio*, 385 U.S. 92 (1966). See *Anders* v. *California*, 386 U.S. 738, 743 (1967). The defendant contended that the prosecutor's comment upon his failure to testify violated *Griffin* v. *California*, 380 U.S. 609 (1965), which was decided after he had exhausted his state appeals without raising the issue. The Court unanimously held "that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. . . . Defendants can no more be charged with anticipating the *Griffin* decision than can the States. . . . Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to

attack the practice following its invalidation by this Court." 385 U.S. at 93; see *United States* v. *Johnson*, 457 U.S. 537, 543 (1982).

In *Smith* v. *Yeager*, 393 U.S. 122 (1968), the defendant, convicted of murder in state court, sought federal habeas corpus on the basis of an allegedly involuntary confession before this Court's decision in *Townsend* v. *Sain*, 372 U.S. 293 (1963). At that time the law provided an evidentiary hearing only in " 'unusual circumstances'," and it was doubtful that the defendant could have got one. 393 U.S. at 125. His attorney told the District Court that he did not need one, and the District Court found that his confession was not involuntary. After *Townsend*, the defendant again sought federal habeas corpus on the same ground. This time he requested an evidentiary hearing, alleging new facts making a stronger case for coercion in connection with his confession. The District Court denied that request on the basis of his first petition. This Court reversed, explaining that it could not find that the defendant "intentionally relinquished a known right or privilege . . . when the right or privilege was of doubtful existence at the time. . . ." 393 U.S. at 126.

In *Davis* v. *United States*, 417 U.S. 333 (1974), this Court upheld "the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law." *Id.* at 334. *Davis* involved a conviction for draft evasion. The defense was one that this Court later recognized in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), but the Court of Appeals denied the defendant relief on the basis that his case did not come within *Gutknecht*. Thereafter, the Court of Appeals decided another case in a contrary manner, but refused to give the defendant the benefit of that change in circuit law when he brought a petition under 28 U.S.C. section 2255. This Court reversed, holding that the defendant was entitled to base his claim for collateral relief on "an intervening change in law." *Id.* at 342; see also, *id.* at 347 (Powell, J., concurring and dissenting) (section 2255 is available "due to the intervening change in the law of the Circuit").

Davis may be compared with an earlier draft evasion case, *Sunal* v. *Large*, 332 U.S. 174 (1947). In *Sunal*, the defendants raised a defense that this Court upheld after their trial in *Estep* v. *United States*, 327 U.S. 114 (1946). Defendants were represented by the same attorneys who were handling the *Estep* case in the appellate process at the time, but they did not appeal. When they later sought to attack their convictions collaterally, this Court denied them relief. The Court first speculated that the defendants' failure to appeal may have been a deliberate litigation tactic: "Why the legal strategy counseled taking appeals in the . . . *Estep* cases and not in these we do not know. Perhaps it was based on the facts of these two cases." 332 U.S. at 181. The Court proceeded to deny relief on a rationale similar to that in *Engle*, explaining: "The case, therefore, is not one where the law was changed after the time for appeal had expired. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized." *Id.* Thus, the Court implied that it would excuse a default "where the law was changed after the time for appeal had expired," but it said that not only was the basis for the new law already available, but the defendants' attorneys were presenting the claim at that very time in other cases. The Court emphasized that the defendants were not claiming that they had suffered a violation of due process and that the error did not "trench on any constitutional rights of defendants." 332 U.S. at 182. In *Davis*, the Court said that *Sunal* "recognized that this rule would not bar the assertion of *constitutional* claims in collateral proceedings even if the applicant had failed to pursue them on appeal." 417 U.S. at 345 n.15.[4]

An analagous situation was presented in *Reece* v. *Georgia*, 350 U.S. 85 (1955). In that case, the defendant tried to chal-

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[4]Justice Frankfurter dissented in *Sunal*, saying that he would have allowed habeas corpus because these were exceptional circumstances. Justices Rutledge and Murphy also dissented, saying that the change in law established a good reason for defendants' failure to appeal.

lenge the grand jury that indicted him. State law required such a challenge to be made before indictment, but the defendant did not have counsel appointed to represent him until the day after his indictment.[5] This Court therefore agreed to entertain the issue on the merits on direct review: the obligation to comply with the state rule, the Court reasoned, "presupposes an opportunity to exercise that right." 350 U.S. at 89; *accord*, *Carter* v. *Texas*, 177 U.S. 442 (1900).

Thus, the Court has regularly recognized that a change in the law is an adequate excuse for failing to raise an issue before the change became effectively available. See also, *Estelle* v. *Williams*, 425 U.S. 501, 515 (1976) (we need not allow "counsel for a defendant deliberately to forgo objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection . . . ."); *Johnson* v. *Bennett*, 393 U.S. 253, 255 (1968) (discussed at page 27); *Sanders* v. *United States*, 373 U.S. 1, 17 (1962) ("If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law . . . ."); *Brown* v. *Allen*, 344 U.S. 443, 486 (1953) ("failure to raise a known and existing question of unconstitutional proceeding."). *Price* v. *Johnston*, 334 U.S. at 291 ("The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief"); *New York Central R. Co.* v. *New York and Pa. Co.*, 271 U.S. 124, 127 (1926); *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) ("(T)he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); see also, *Staub* v. *City of Baxley*, 355 U.S. 313, 318-319 (1958). Over the years no Justice has expressed a contrary view. In *Engle*, the

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[5] Ross' handicap was similar: he did not have available the legal principle that made his right to counsel meaningful until the day for him to raise the issue on appeal had passed.

Court seemed to agree with this position. Referring to footnote 8 in *Hankerson*, the Court said: "In these cases we accept the force of that language as applied to defendants tried after *Winship*." 456 U.S. at 134 n.43.

(2) *The decisions of other courts and law review comments.* Other courts[6] and commentators[7] have reached a unanimous consensus that a retroactive change in the law is a paradigm example of "cause" for failure to raise an issue in accordance with a state procedural rule. Neither the State nor the Solicitor General has referred to a single authority to the contrary.

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[6] Third Circuit: *Boyer* v. *Patton*, 579 F.2d 284, 288 (3d Cir. 1978); see also, *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 443, 444 (3d Cir. 1982); Fourth Circuit: *Ross* v. *Reed*, 704 F.2d 705, 708-709 (4th Cir. 1983) (the decision below); *Ledbetter* v. *Warden*, 368 F.2d 490, 494 (4th Cir. 1966) (*en banc*); see also, *Bramwell* v. *Williams*, 445 F. Supp. 106, 114 (D. Md. 1977); Fifth Circuit: *Preston* v. *Maggio*, 705 F.2d 113, 117 (5th Cir. 1983); Sixth Circuit: *Canary* v. *Bland*, 583 F.2d 887, 890 (6th Cir. 1978); see also, *id.* at 894 (Merritt, Cir. J., concurring) ("He has shown 'cause' in that the applicable opinions upon which he relies had not been decided nor could reasonably have been anticipated at the time . . . .") Seventh Circuit: *Norris* v. *United States*, 687 F.2d 899, 903 (7th Cir. 1982) (dictum) ("In some cases there may be a good reason for this weird procedure [failing to raise an issue on appeal]—such as incompetency of counsel in the first appeal, newly discovered evidence, or an intervening change in the law—and if so the appellant will be able to demonstrate good cause for his failure. . . ."); Eighth Circuit: *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), *cert. den.*, 439 U.S. 1133 (1979); see also, *Dietz* v. *Solem*, 677 F.2d 672, 675 (8th Cir. 1982); Ninth Circuit: *Gibson* v. *Spalding*, 665 F.2d 863, 866 (9th Cir. 1981), *vacated for reconsideration in light of Engle*, 456 U.S. 962 (1982), *on remand*, 703 F.2d 363 (9th Cir. 1983); *Myers* v. *Washington*, 646 F.2d 355, 359, 360 (9th Cir. 1981) *vacated for reconsideration in light of Engle*, 456 U.S. 921 (1982), *on remand*, 702 F.2d 766 (9th Cir. 1983) (None of the *Sykes* considerations "has any force in dealing with a situation . . . where the alleged procedural default consists of failure to raise on appeal constitutional issues that were unknown at the time the appeal was taken."); Eleventh Circuit: *Sullivan* v. *Wainwright*,

(3) *The Federal Rules.* Rule 9(a) of the Federal Rules of Habeas Corpus presents a comparable situation. Rule 9(a) provides:

> "A petition may be dismissed if it appears that the state has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is

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695 F.2d 1306, 1308-1311 (11th Cir. 1983); see also, *Ford* v. *Strickland*, 696 F.2d 804, 817 (11th Cir. 1983) *(en banc)*; *id.* at 883 n.9 (concurring and dissenting opinion); West Virginia: *Jones* v. *Warden*, 241 S.E.2d 914, 916 (W. Va. 1978) ("Safeguarding the integrity of the factfinding process must take priority over procedural concerns such as whether a trial lawyer could perceive future United States Supreme Court rulings and object to acts or instructions on the basis of constitutional infirmities yet unborn.").

[7] *E.g.*, Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 460 (1963) (recommending a limitation "placing on the prisoner the obligation to make his allegations within a reasonable time after they have become available to him."); Friendly, "Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments," 38 U. Chi. L. Rev. 142, 153 (1970) ("New constitutional developments relating to criminal procedure are another special case.") Goodman and Sallet, "Wainwright v. Sykes: The Lower Federal Courts Respond," 30 Hastings L.J. 1683, 1712 (1970); Hart, "Foreword: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 112 n.81 (1959) ("excusable ignorance of facts or law"); Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1078 n.160 (1978) ("The decision of the Court to make its new rule retroactive would be reduced to a mockery if the right of the prisoner depended on foresight of counsel in anticipating the new constitutional development."); Tague, "Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do," 31 Stan. L. Rev. 1, 25 (1978); Westen, "Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure," 75 Mich. L. Rev. 1214, 1245 (1977) ("(I)f a newly recognized defense is constitutionally retroactive, a defendant who was convicted in the past is constitutionally entitled to raise the claim now as a defense to his conviction.")

> based on grounds of which he could not have been aware by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

The Advisory Committee Note to that Rule, 28 U.S.C.A. foll. § 2254 at 1138, specifies: "The Petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law . . . ."

Rule 9(b) provides for the dismissal of successive petitions if there is an "abuse of the writ." Here again the Advisory Committee Note, 28 U.S.C.A. foll. § 2254, at 1139, specifies: "There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples."[8]

(4) *Reagan Administration proposals in Congress to define "cause."* The United States Senate on February 6, 1984 by a vote of 67-9 passed the Reform of Federal Intervention in State Proceedings Act, S. 1763, 98th Cong. That bill defines "cause" in three circumstances. One of those circumstances is if "the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable." That bill was sponsored by the Administration. Thus, the Administration's legislative program

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[8] The courts have frequently used a change in the law to excuse delayed or successive petitions. See *Alexander* v. *Maryland*, 719 F.2d 1241, 1246 (4th Cir. 1983); *Garland* v. *Cox*, 472 F.2d 875, 877 (4th Cir.), *cert. den. sub nom. Slayton* v. *Garland*, 414 U.S. 908 (1973); *Marks* v. *Estelle*, 691 F.2d 730, 733, 735 (5th Cir. 1982) ("In effect, the state argues that Marks should have brought *Argersinger* before *Argersinger* was brought—that he was bound to assert a constitutional right he did not have. This would require a degree of diligence much higher than reasonable. . . . It would be palpably unfair to require a habeas petitioner to assert a constitutional right before that right exists."); *McDonnell* v. *Estelle*, 666 F.2d 246, 253 (5th Cir. 1982). See *Antone* v. *Dugger*, 104 S.Ct. 962, 965 (1984).

and the Senate's action are contrary to the Solicitor General's position.[9]

C. The Reason For Ross' Failure To Raise The Issue On Appeal Was That His Appeal Had Been Decided By The Time *Winship* Laid The Basis For His Constitutional Claim And Before Any Lawyers, Courts Or Commentators Had Perceived Or Litigated The Issue.

(1) *The test for a change in the law.* The reasons for recognizing a change in the law in the calculation of "cause" are equitable and institutional. The equitable reason is the unfairness of depriving a defendant of a newly declared principle of due process that applies retroactively to his trial solely because he did not preserve the issue at a time before it was reasonable to expect him to be aware of the issue. Sustaining his unconstitutional conviction for conduct that it was not reasonably possible for him to avoid would have the appearance of a penalty[10] that would be "disproportionate to the magnitude of the offense against the state's procedural system."[11]

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[9] An earlier version of the Administration proposal, S. 2216, 97th Cong., defined "cause" to exist where "the Federal right asserted was not recognized prior to the procedural default." Another Administration bill introduced during the same Congress, S. 2903, 97th Cong., contained a definition of "cause" in the identical language of the bill passed by the Senate on February 6. Analogous bills introduced into the House would make the same provision. H.R. 3416, 97th Cong.; H.R. 6050, 97th Cong.; H.R. 7117, 97th Cong.; H.R. 50, 98th Cong.

[10] See Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1064 (1978); Rosenberg, "Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel," 62 Minn. L. Rev. 341, 414 (1978); Tague, "Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do," 31 Stan. L. Rev. 1, 42 (1978); Comment, 130 U. Pa. L. Rev. 981, 984 (1982); "The Supreme Court, 1981 Term," 96 Harv. L. Rev. 1, 226 (1982).

[11] Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1071 (1978).

The institutional reason was described in *Engle:* "We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." 456 U.S. at 131; see *Ross* v. *Reed*, 704 F.2d at 708; see also, *Jones* v. *Barnes*, 103 S.Ct. at 3312-3313; *Myers* v. *Washington*, 646 F.2d 355, 360 (9th Cir. 1981), *vacated*, 456 U.S. 921 (1982), *on remand*, 702 F.2d 766 (9th Cir. 1983). The problem is even more acute for appeals. Trials accomodate a multitude of objections of varying degrees of import that would clutter an appeal. Appellate counsel should screen out frivolous issues. An automatic forfeiture rule, however, would deprive counsel of the flexibility to make judgments about the relative likelihood of success of issues in light of the reasonably available or developing law at the time.[12]

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[12] Conscientious counsel already are reacting to the extension by some Courts of Appeals of *Wainwright* v. *Sykes* to appeals by trying to preserve all conceivable issues. See, *e.g.*, *State* v. *Brown*, 306 N.C. 151, 293 S.E.2d 569, 583 (1982) ("Counsel acknowledges that many of these issues have been previously addressed and candidly concedes that he would have to 'overcome substantial precedent' in order to prevail. Without unduly burdening this Court with extended argument defendant requests that we review these issues and reconsider our prior holdings."); *State* v. *Sparks*, 297 N.C. 314, 255 S.E.2d 373, 376 (1979) ("Defendant has sought to bring forward over 200 exceptions . . . .")

Even such efforts by defense counsel will not raise unforeseen constitutional doctrines that receive subsequent development unless they also exercise "extraordinary vision." *Engle* v. *Isaac*, 456 U.S. at 131.

The North Carolina Supreme Court has already expressed resentment over this practice which appears necessary unless the *Wainwright* "cause" standard allows counsel to select the most promising issues for review, see *Jones* v. *Barnes*, 103 S.Ct. at 3313, without risking the automatic forfeiture of others that future decisions might enhance. For example, in *State* v. *Warren*, ___ N.C. ___, 306

These two reasons inform the formulation of the test for what constitutes a change in the law. The question should be whether the state of the law at the time was such that counsel's unawareness of the issue was "excusable." *Engle* v. *Isaac*, 456 U.S. at 130 n.35; *Wainwright* v. *Sykes*, 433 U.S. at 89 n.13; *Estelle* v. *Williams*, 425 U.S. at 513 (Powell, J., concurring); Hart, *Foreward: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 118 (1959), or a "justifiable reason." *Price* v. *Johnston*, 334 U.S. at 291. Thus, *Engle* held that the standard was not met where the claim was "far from unknown," 456 U.S. at 131, and where "other defense counsel have perceived and litigated that claim." 456 U.S. at 134; *cf.*, *Estelle* v. *Williams*, 425 U.S. at 511-512 n.8. The Solicitor General agrees that "(t)he only certain standard would be to say that a claim is no longer novel once it has been 'perceived and litigated' . . . in any reported case." Brief for the United States 25.

An appropriate analogy is the test for whether a decision announced a "new rule" for the purpose of the retroactivity-

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S.E.2d 446, 448 (1983), that Court said: "Defendant challenges the process of death qualifying the jury and assigns as error the trial court's denial of his motion for a separate trial jury and a separate sentencing jury. This Court has consistently rejected defendant's contentions." 306 S.E.2d at 448. Then, quoting from *Jones* v. *Barnes*, the Court criticized counsel for raising the issue after the Court had rejected it in earlier cases. 306 S.E.2d at 448. The issue that the Court criticized counsel for raising is an important one that holds promise of ultimately deserving the attention of this Court, however, and has since that decision won favor in *Avery* v. *Hamilton*, ___ F. Supp. ___ (W.D. N.C. 1984) and *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), appeal pending, No. 83-2113. See also, *State* v. *Jackson*, 309 N.C. 26, 305 S.E.2d 703, 708 n.1 (1983); *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, 212 (1982) ("Defendant brings forward many assignments of error . . . . At the outset, we must note that defendant's appellate counsel filed a brief which is 109 pages long. A defendant who stands convicted in a capital case is, of course, entitled to effective and diligent advocacy in the presentation of his appeal. However, defendant's brief seems unduly lengthy and quite repetitious.").

prospectivity question. That determination serves parallel purposes of protecting equitable (the reliance factor) and institutional concerns on the part of the states. In *United States* v. *Johnson*, this Court recently summarized the three categories of "new rules" for this purpose: (i) "(A) decision explicitly overrules a past precedent of this Court." 457 U.S. at 551; see also, *id.* at 550 n.12. (ii) A decision "disapproves a practice this Court arguably has sanctioned in prior cases." *Id.* at 551. (iii) A decision "overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.*; see also, *id.* at 550 n.12 (" 'or by deciding an issue of first impression whose resolution was not clearly foreshadowed' ").

(2) *Engle did not meet the test for a change in the law.* The respondents in *Engle* were convicted in separate trials in January, April and September, 1975. As this Court found, there was a substantial legal foundation in existence by that time that should have alerted them to the issue. That foundation consisted of the following:

(i) The principal component was *In re Winship*, 397 U.S. 358 (1970). As the Court said in *Engle*: "*In re Winship* . . . laid the basis for their constitutional claim." 456 U.S. at 131. *Winship* was decided more than four years before the trials in that case.

(ii) Between the time of the decision in *Winship* and the respondents' trials "dozens of defendants relied upon this language [in *Winship*] to challenge the constituionality of rules requirng them to bear a burden of proof." 456 U.S. at 131-132. Those cases involved the burden of proof not only with regard to elements of the offense charged such as the mental element for the crime (*e.g.*, lack of intent to return a stolen item) and the identify of the defendant as the perpetrator (alibi), but also a range of affirmative defenses including insanity, entrapment, license or authorization to sell drugs, inducement, lack of malice, and, most importantly, the issue involved in all three cases in *Engle*, self-defense. 456 U.S. at 132 n.40.

(iii) "(N)umerous courts agreed that the Due Process Clause required the prosecution to bear the burden of disproving certain affirmative defenses." 456 U.S. at 133. Indeed, *Mullaney* had already been decided at the District Court and Court of Appeals levels and was pending before this Court. The trial in one of the three cases in *Engle* actually took place three months after this Court's decision in *Mullaney*.

(iv) "Several commentators also perceived that *Winship* might alter traditional burdens of proof for affirmative defenses." 456 U.S. at 133 n. 40. These materials were published between 1970 and 1974.

(v) Ohio had adopted a new criminal code that put the burden of persuasion for affirmative defenses on the prosecution. 456 U.S. at 111.

(3) *This case does meet the test for a change in the law.* At the time of Ross' appeal, none of that material existed. See Exhibit B. *Winship* "laid the basis," 456 U.S. at 131, for Ross' constitutional claim only after he had concluded his appeal.

(i) Although until *Winship* and *Mullaney*, it had "long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required," *Winship*, 397 U.S. at 362, it had also been "the long accepted rule . . . that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson* v. *New York*, 432 U.S. 197, 211 (1977). In *Leland* v. *Oregon*, 343 U.S. 790, 797 (1952), the Court had upheld a state procedure putting on the defendant the burden of proving his insanity defense beyond a reasonable doubt. That decision was the prevailing constitutional law regarding the allocation of the burden of proof on affirmatve defenses until *Winship* began to cast doubt on it. See *State* v. *Wilbur*, 278 A.2d 139, 146 (Me. 1971).

Winship "held *for the first time* that the Due Process Caluse of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged.' " *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979) (emphasis added); see also, *id.* at 317-318 ("*Winship* . . . established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process".). The constitutional character of the standard of proof beyond a reasonable doubt was "announced in *Winship*." *Ivan V.* v. *New York*, 407 U.S. 203, 205 (1972); see also, *Cool* v. *United States*, 409 U.S. 100, 104 (1972). In *Patterson*, the Court described the process of decision: "In 1970, the Court declared that the Due Process Clause 'protects the accused against conviction except upon proof beyond a reasonable doubt. . . . *In re Winship*. . . . Five years later, in *Mullaney* v. *Wilbur*, . . . the court further announced . . . ." 432 U.S. at 204-205.

In *Mullaney*, the Court stated the issue as whether Maine law "comports with the due process requirement, as defined in *In re Winship*." 421 U.S. at 685. In its discussion, the Court based its decision on *Winship*. 421 U.S. at 698-701. Justice Rehnquist, joined by Chief Justice Burger, agreed in a concurring opinion that *Winship* required the Court's result. 421 U.S. at 705.

In *Engle*, this Court noted that even before *Winship* one federal court of appeals and one state court had decided that the constitution requires the prosecution in a criminal case to bear the burden of proof on the elements of the crime. The federal case, *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir.) *(en banc), cert. den.*, 393 U.S. 1001 (1968), involved an alibi. The court based its decision on the obvious point that alibi is not an affirmative defense but is simply a special term for a form of defense evidence contradicting the prosecution's proof of an essential element of the offense as charged, that the defendant was at the scene of the crime. By imposing the burden of proof on that issue on the defendant, the court recognized, the State effectively required the defendant to prove that he was not the perpetrator of the offense. Reasoning that this was different from putting the burden of proof on the defendant for a true affirmative defense, and distinguishing *Leland* v. *Oregon* on that basis, 398 F.2d at 119, the court held it was unconstitutional.

The same court, however, then rejected a similar challenge from a defendant who had been convicted in 1934 in a trial with the same instruction on the alibi burden of proof, and had not then objected to the instruction, holding that its new decision should not be given retroactive application. *Johnson* v. *Bennett*, 386 F.2d 677, 683 (8th Cir. 1967). This Court vacated that decision and remanded the case for reconsideration in light of *Stump*. *Johnson* v. *Bennett*, 393 U.S. 253, 255 (1968).

The state decision was *State* v. *Nales*, 28 Conn. Sup. 28, 248 A.2d 242 (1968). That case relied on *Stump* in holding unconstitutional a statute putting the burden on a defendant charged with possession of burglary tools to prove that he had a lawful excuse for having his tools—that is, requring the defendant to disprove the mental element for the crime.

These cases confirm the statement in *Winship* that it had been assumed that the reasonable doubt doctrine was a constitutional standard. They were, however, the earliest cases to translate that assumption into a rule supervising the burden of proof instructions in a state criminal case,[13] and they involved only the burden of proof on the elements of the offense, not an affirmative defense.

Mullaney was a substantial extension, *Mullaney* v. *Wilbur*, 421 U.S. at 697, of *Winship*. The extension consisted of imposing the burden on the prosecution of proving beyond a resaonable doubt, not only the elements of the offense, but also the absence of certain matters of excuse or attenuation. As to this extension, after *Leland* v. *Oregon*, no lawyer, no court, and no commentator ventured the constitutional argument before *Winship*. See Brief for the United States 10-12, 1a-10a.[14] In

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[13] Indeed, *Stump* arose on habeas corpus after Stump had only five years earlier been unsuccessful in trying to assert the same issue on his direct appeal. See *Stump* v. *Bennett*, 398 F.2d at 113. This Court denied certiorari on that direct review. *Stump* v. *Iowa*, 375 U.S. 853 (1963).

[14] The Solicitor General canvassed the pre-*Winship* state and federal decisions in search of cases in which counsel raised the *con-*

1971, the court in *State* v. *Wilbur*, 278 A.2d 139 (Me. 1971), said: "We take judicial notice of the fact that historically a charge substantially in this form has been frequently given in the trial of murder cases but has not heretofore been challenged." *Id.* at 144.

(ii) The North Carolina law that denied Ross due process at his trial was based precisely on that distinction. It required the defendant to establish an "affirmative defense," *State* v. *Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969); *State* v. *Absher*, 226 N.C. 656, 40 S.E.2d 26, 29 (1946), consisting of "matters of excuse or extenuation," *State* v. *Willis*, 63 N.C. 26, 29 (1868), to the satisfaction of the jury. See *State* v. *Hankerson*, 220 S.E.2d at 585. *Mullaney* shattered the certainty of that distinction, *cf.*, *Engle* v. *Isaac*, 456 U.S. at 122; *Patterson* v. *New York*, 432 U.S. at 202, 205-207, 210, but the distinction dominated North Carolina homicide jurisprudence until that decision.

The North Carolina law imposing on the defendant the burden of proof on self-defense and lack of malice enjoyed an established status for 105 years at the time it was applied in

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stitutional issue with regard to the burden of proof on malice or self-defense, but found none. He did locate five such federal decisions describing the burden of proof in general constitutional terms, but none in which the issues in this case were raised. Brief for the United States 10a. The Solicitor General also found three pre-*Leland* v. *Oregon* state cases that discussed the burden of proof issue as an important one but concededly not as a constitutional one. Brief for the United States 10-11, 11 n.8. Interestingly, those cases required the prosecution to prove a defendant's sanity, which this Court has held is not constitutionally required even after *Winship*, *Rivera* v. *Delaware*, 429 U.S. 877 (1976); *Patterson* v. *New York*, 432 U.S. 197, 205 (1977), and self-defense, which this Court so far has characterized as only "a plausible constitutional claim." *Engle* v. *Isaac*, 456 U.S. at 122. The only other discovery that the Solicitor General presented was that as of 1969 19 states did place the burden of proof on the prosecution on the issue of malice and 23 did so on the issue of self-defense. Brief for the United States, 10, 1a-9a.

Ross' trial. Enunciated in 1864, it was not even challenged until after *Winship*, and was not changed until after *Mullaney*. *State* v. *Hankerson*, 220 S.E.2d at 586. Indeed, the North Carolina Supreme Court routinely reiterated it after the *Stump* and *Nales* decisions, shortly after Ross' trial, *State* v. *Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969), and again shortly after it decided Ross' appeal. *State* v. *Jennings*, 276 N.C. 157, 171 S.E.2d 447, 449 (1970). Fourteen months after *Winship* was decided, the North Carolina Supreme Court continued to uphold convictions obtained with the unconstitutional instructions without any reference to *Winship* or constitutional questions. *State* v. *Duboise*, 279 N.C. 73, 181 S.E.2d 393, 398 (1971); *State* v. *Winford*, 279 N.C. 58, 181 S.E.2d 423, 427-428 (1971); see *State* v. *Hankerson*, 220 S.E.2d at 586. Other state courts did the same, *e.g.*, *Bosnick* v. *State*, 248 Ark. 1289, 455 S.W.2d 688, 690 (1970); *Wheeler* v. *Comm.*, 472 S.W.2d 254, 256 (Ky. 1971); *State* v. *Jarvi*, 3 Or. App. 391, 474 P.2d 363, 365 (1970); *Comm.* v. *Commander*, 436 Pa. 532, 260 A.2d 673, 778 (1970); *Escamilla* v. *State*, 464 S.W.2d 840, 841 (Tex. Crim. App. 1971).

It was not until five years after Ross' appeal that the issue began to surface in the North Carolina courts, and even then it was rejected. The first case to raise the issue in North Carolina was *State* v. *Sparks*, 285 N.C. 631, 207 S.E.2d 712 (1974). The North Carolina Supreme Court gave the argument only cursory treatment, holding that *Winship* is not "pertinent to the facts in this case." 207 S.E.2d at 719. It then concluded: "We have carefully considered defendant's argument that we should change our well-established rule. However, we are not persuaded to do so." *Id.*

Two other cases raised the issue in North Carolina before *Mullaney*. In *State* v. *Wetmore*, 287 N.C. 344, 215 S.E.2d 51, 56 (1975), the North Carolina Supreme Court ruled: "We did reject this argument in *Sparks*, and we adhere to that decision." 215 S.E.2d at 56. In *State* v. *Harris*, 23 N.C. App. 77, 208 S.E.2d 266 (1974), the North Carolina Court of Appeals said simply: "We also reject it." *Id.* at 268.

(iii) Plainly, North Carolina did not recognize the implications of *Winship* until *Mullaney* decided them. There was no sense of any constitutional challenge to its century-old law among defense attorneys until some time after *Winship*, and not in the courts until after *Mullaney*. That was true of other states as well. *E.g.*, *Henderson* v. *State*, 234 Ga. 827, 218 S.E.2d 612, 617 (1975); *State* v. *Evans*, 278 Md. 197, 362 A.2d 629, 634 (1976).

When *Mullaney* was decided, the North Carolina Supreme Court recognized that the seminal decision for its doctrine was *Winship*. *State* v. *Hankerson*, 220 S.E.2d at 583, 590. That Court insisted that it was only the decision in *Mullaney* that prohibited "the use of our long-standing rules in homicide cases that a defendant" has the burden of proof on the issues of lack of malice and self-defense. *Id.* at 584. The standard instructions to the jury, the Court held, "violate the concept of due process announced for the first time in *Mullaney*," *id.*, which it characterized as a "new rule." *Id.* at 590.

The North Carolina Attorney General, in his brief on behalf of the State filed in this Court in *Hankerson* v. *North Carolina*, also took the position that: "Until the decision in *Mullaney*, there was absolutely no hint from this Court in its prior decisions that the states were not free to place some burden of proof as to affirmative defenses on a defendant in a criminal trial. . . . *In re Winship*, did not purport to deal with affirmative defenses." *Hankerson* v. *North Carolina*, Brief of respondent North Carolina 10. The State elaborated as follows:

> "The case was argued orally in the North Carolina Court of Appeals on May 29, 1975. (A.1) At this point in time no one involved in the case could have known that about two weeks later, on June 9, 1975, *Mullaney* v. *Wilbur* would be announced *establishing a new constitutional due process standard* applicable to the states concerning the placement burden (sic) of proof as to affirmative defenses in homicide prosecutions. *At the time the case was tried, appealed, briefed and argued in the first appellate court level, no error in applying the State allocation of the burden of proof existed which couldd have been made the*

> *basis of an exception and assigned as error.* So also, there was no federal constitutional doctrine applicable to the states which would have required the trial judge to allocate the burden of proof differently than was actually done in his instructions. Because of the lack of any overriding federal constittional standard, the trial judge correctly applied the long-standing North Carolina rules and the *Petitioner quite properly took no exception thereto.*"

Hankerson v. *North Carolina*, Brief of Respondent North Carolina 13 (emphasis added). The State had also expressed this position in its brief opposing the petition for certiorari as follows:

> "(I)t should be noted there was no 'foreshadowing' of the *Mullaney* doctrine in any prior decisions so as to weaken the reliance [of the North Carolina courts] on past rules. As noted previously *In re Winship*, *supra* and *Ivan V.* v. *City of New York*, *supra*, merely applied the long-standing rules of proof of guilt beyond a reasonable doubt to juvenile proceedings where a finding of delinquency was based on proof of a crime. . . . (U)ntil late 1974, never had any Federal court decision 'foreshadowed' this *new doctrine.*"

Hankerson v. *North Carolina*, *supra*, Brief of North Carolina in Opposition to Petition for Writ of Certiorari 26-27 (emphasis added); see also, *id.* at 13.[15]

After this Court's decision in *Hankerson*, the State modified its position. In *Cole* v. *Stevenson*, 620 F.2d 1055 (4th Cir. 1980), the State argued as follows:

> "The fact that *Mullaney* v. *Wilbur*, *supra*, had not been decided in 1971 when petitioner appealed is not significant in this case. *Mullaney* was an application of a 1970 case, *In re Winship*, 397 U.S. 358, a case preceding the instant one; and contentions of the sort made in this case were made in North Carolina prior to *Mullaney* being handed down in

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[15] The Solicitor General, in his statement of the "Question Presented" and his "Statement," also takes the position that Ross' constitutional claim is "based on *Mullaney* v. *Wilbur*". Brief for United States (1), 3.

> the spring of 1975, *State* v. *Sparks* . . .; *State* v. *Harris* . . . ."

Cole v. *Stevenson*, Brief of North Carolina 21-22.

Thus, the courts and the Attorney General of North Carolina have agreed that: (i) the furthest the *Mullaney* doctrine can be traced is to *Winship;* (ii) before *Winship* there was no constitutional basis for challenging the burden of proof instructions on malice and self-defense; and (iii) it was proper or excusable for defendants at that time not do so. "[T]he entire legal system viewed the procedures used to convict as constitutionally proper" at the time of Ross' conviction, to use a test suggested by the Solicitor General. Brief for the United States 7.[16]

That position conforms with this Court's understanding expressed in dictum in *Engle*, 456 U.S. at 131. The Court of

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[16] The Solicitor General argues that a new retroactive decision will "almost always" have been " 'perceived and litigated' " by the time of "the earliest conviction still subject to collateral attack." Brief for the United States 24. The discussion in the text demonstrates that *Mullaney* is a retroactive decision that did not become reasonably available as a constitutional matter until at least *Winship* provided the tools for it, and had not earlier been "perceived and litigated."

In support of his position, the Solicitor General contends that the reason for retroactivity of decisions that relate to the truth-finding function of a trial "is that those precedents were not 'newly minted' . . . ., but anticipated far in advance of this Court's decisions." Brief for the United States 20. In *Hankerson*, however, this Court expressly applied *Mullaney* retroactively only because unconstitutional instructions on the burden of proof substantially impair the truth-finding process, and therefore disregarded North Carolina's argument that *Mullaney* could not have been anticipated in advance. 432 U.S. at 242-243. Thus, *Mullaney* applies to cases that had completed the appellate process by the time of the decision and were raising the issue on habeas corpus. *Cf.*, *United States* v. *Johnson*, 457 U.S. 537, 562 (1982) (holding that a new interpretation of "the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.").

Appeals, therefore, correctly held that this case qualifies as "cause" for a failure to raise an issue before the announcement of a change in the law. Although *Winship* and *Mullaney* did not overrule any precedent, including *Leland* v. *Oregon*, *cf. Rivera* v. *Delaware*, 429 U.S. 877 (1976), they did disapprove a practice that *Leland* v. *Oregon* had been thought to sanction. *Winship* and *Mullaney* overturned a longstanding and widespread practice which a unanimous body of lower court authorty had approved as a constitutional matter. Because, as the State conceded in *Hankerson* and *Cole*, this result was not clearly foreshadowed before *Winship*, and because other defense counsel had not yet perceived and litigated the issue, *Winship* and *Mullaney* may fairly be characterized as a change in the law that Ross is excused for not foreseeing in 1969.

D. The Policies Supporting A Forfeigure For Failing To Comply With A Contemporaneous Objection Rule At Trial Do Not Apply To Ross' Failure To Raise An Issue On Appeal.

In *Fay* v. *Noia*, 372 U.S. 391 (1963), the petitioner sought federal habeas corpus review of a claim that his state court conviction had resulted from the use of a coerced confession at his trial. He had not appealed his conviction, however, and the state courts refused on that account to review his conviction on *coram nobis*. This Court held that his failure to appeal—as long as it was not a deliberate by-pass of state remedies—was not a bar to federal post-conviction review. The Court applied the same rule to federal cases in *Kaufman* v. *United States*, 394 U.S. 217, 220 n.3 (1969).

In *Davis* v. *United States*, 411 U.S. 233 (1973), the Court began to question whether that doctrine should apply to trial-level defaults. *Davis* involved a failure to comply with Rule 12(b)(2) requiring that a challenge to the grand jury composition be made by motion before trial. Distinguishing that situation from a failure to assert a claim on appeal, *id.* at 240, the Court enforced the procedural bar on habeas corpus because compliance with the rule would have permitted timely cure of

the error. *Id.* at 241. The Court noted also that finding a forfeiture on the basis of noncompliance with the rule prevents "sandbagging." In *Francis* v. *Henderson*, 425 U.S. 536, 540 (1976), the Court recognized that a similar state rule had the same value for timely prevention of error.

In *Mullaney* v. *Wilbur*, Justice Rehnquist, joined by Chief Justice Burger, observed in a concurring opinion that "failure to object to a proposed instruction should stand on a different footing" than a failure to appeal. 421 U.S. at 74 n.*. He explained: "It is one thing to fail to utilize the appeal process to cure a defect which already inheres in a judgment of conviction, but it is quite another to forgo making an objection or exception which might prevent the error from ever occurring." *Id.* The next Term Chief Justice Burger wrote an opinion for the Court in *Estelle* v. *Williams*, 425 U.S. 501 (1976), holding that trying a defendent in prison garb did not violate due process if the defendant did not object. In a concurring opinion, Justice Powell pointed out that a timely objection would have allowed the trial judge to correct the situation. *Id.* at 514. Emphasizing that the case involved a "curable trial defect," *id.* at 515, he observed: "The right involved here is a trial-type right. As a consequence, an attorney's conduct may bind the client." *Id.* at 515 n.4. Then in *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), Chief Justice Burger, in a separate opinion, again argued that *Fay* involved "*post*-trial omissions of a technical nature which would be unlikely to jeopardize substantial state interests. *Mid* trial omissions such as occurred in this case, on the other hand, are substantially different." *Id.* at 158. Accordingly the Chief Justice urged: "The 'deliberate bypass' doctrine of *Fay* v. *Noia*, *supra*, should not be extended to midtrial procedural omissions which impair substantial state interests." *Id.*

The Court adopted that position in *Wainright* v. *Sykes*, 433 U.S. 72, 87 (1977), to deal with a failure to object at trial to the admissibility of a confession. Distinguishing a failure to appeal,

id. at 88, the Court explained that a contemporaneous objection rule at trial serves important interests:[17]

(1) Finality: "A contemporaneous objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation." 433 U.S. at 88; see also, *Francis* v. *Henderson*, 425 U.S. 536, 540 (1976). Justice Rehnquist, the author of *Wainright* v. *Sykes*, had explained in his separate opinion in *Mullaney* that this paramount consideration does not apply to a failure to utilize the appeal process. By the time of appeal, it is too late to cure a fundamental constitutional error except by a new trial, so a requirement that the issue be raised on appeal cannot prevent the necessity of a retrial.

Beyond "the problems of finality and federal-state comity [that] arise whenever a state prisoner invokes the jurisdiction of a federal court to redress an alleged constitutional violation," *Jackson* v. *Virginia*, *supra*, 433 U.S. at 322, the interest in finality is therefore not a factor in connection with the enforcement of a state rule requiring issues to be raised on appeal. Such a rule has no relationship to the prevention of trial error. Finality is not advanced by directing defendants to the

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[17] "(A) litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights."

Henry v. *Mississippi*, 379 U.S. 443, 447-448 (1965); see also Hart, "Foreward: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 116-118 (1959). In *Francis* v. *Henderson*, 425 U.S. 536, 540-541 (1976), and *Davis* v. *United States*, 411 U.S. 233, 241 (1973), the Court reviewed the policies underlying the procedural rules involved there and pronounced them "significant," "important and legitimate," *Francis* v. *Henderson*, 425 U.S. at 540, 541, before allowing them to operate as a bar to federal habeas corpus review. See also, *Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978); *Henderson* v. *Kibbe*, 431 U.S. 145, 158 (1977) (Burger, C.J., concurring).

state appellate process; their compliance with that procedure would not end their cases but would rather keep them active for federal habeas corpus review. Denying such review for failure to appeal would finalize the case, but only by an arbitrary procedural trap unless the rule serves some other purpose. "The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured." *Id.* at 323.

(2) Accuracy of record. "A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest . . . ." 433 U.S. at 88. An appeal is already too late to achieve that purpose. It does not afford an opportunity to make a record with witnesses. If an evidentiary hearing is necessary to establish the issue, some form of post-conviction proceeding will be required.

(3) Enabling the prosecution to consider conceding the issue in order to protect against reversal in the event of a conviction. 433 U.S. at 89. This purpose, too, may be served only at trial.

(4) Discouraging "sandbagging." 433 U.S. at 89. The concern about sandbagging, even at trial, may be overstated.[18] In

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[18] See Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 158 (1970); Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1061 (1978); Reitz, "Federal Habeas Corpus: Impact of an Abortive State Proceeding," 74 Harv. L. Rev. 1315, 1351 (1961); Rosenberg, "Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel," 62 Minn. L. Rev. 341, 408, 415 (1978); Spritzer, "Criminal Waiver, Procedural Default and the Burger Court," 126 U. Pa. L. Rev. 473, 507 (1978); Tague, "Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do," 31 Stan. L. Rev. 1, 42-46 (1978); Comment, 130 U. Pa. L. Rev. 981, 993-994 (1982).

any event, by the time of appeal, any such concern has dissipated.[19] Certainly if the issue was preserved at trial, there can be no tactical advantage to withholding it from appeal if it is judged to have any merit. *Cf.*, *Jones* v. *Barnes*, 103 S.Ct. 3308 (1983). If the issue requires a factual hearing, again, it would for that reason not be appropriate for appeal.[20]

(5) Advancing the perception of the criminal trial "as a decisive and portentous event." 433 U.S. at 90. In *Engle*, the Court again expressed concern that federal habeas corpus not undermine "the prominence of the trial itself." 456 U.S. at 127. By definition, that event is concluded when appellate procedures are involved. Nevertheless, a comity purpose may be served by the federal court treating respectfully state appellate procedural requirements.

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[19] In *Ford* v. *Strickland*, 696 F.2d 804 (11th Cir. 1983) (*en banc*), the court said that applying *Sykes* to appeal failures would discourage "defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas corpus." *Id.* at 816. There is no reason for any attorney to pass up the state appellate courts in favor of the federal habeas corpus court when he can present the constitutional issue to both successively. The court made no effort to explain why an attorney would not pursue each avenue of relief for the defendant in every case.

[20] In *United States ex rel. Spurlark* v. *Wolff*, 699 F.2d 354 (7th Cir. 1983) (*en banc*), the Court strained to contrive a hypothetical situation presenting a tactical reason for not presenting a claim on appeal:

> "In *Sumner* v. *Mata*, 449 U.S. 539 (1981), the Court held that factual determinations made by a state appellate court are entitled to a presumption of correctness. In a claim such as ineffective assistance of counsel a state prisoner may believe that it is in his best interest not to present the issue to the state appellate court, which will make a factual determination shortly after the trial that will be entitled to a presumption of correctness, but rather to wait until memories have faded to present his claims to a federal court on a habeas petition."

Id. at 361; see Brief for Pet. 15 n.3. Of course:

(A) *Sumner* v. *Mata* involved appellate findings based on the trial record. 449 U.S. at 543. If the defendant is afraid of losing because of

Invoking one additional policy, the State contends that Ross' failure to raise the *Mullaney* issue on appeal denied the State an earlier opportunity to retry him.[21] See *Engle* v. *Isaac*, 456 U.S. at 127-128; Preliminary Draft of Proposed Amendments to Rule 9(a) of the Rule Governing Section 2254 and Section 2255 Proceedings (August 1983). The problem of delay in a retrial is inherent in retroactivity. See *United States* v. *Johnson*, 457 U.S. 537, 543 (1982). The State's concern is inapposite, however, with regard to cases in which a Supreme Court decision after the conclusion of the appeal effects a change in the law from that which the state appellate courts had been applying.[22] The argument contemplates that if Ross

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a new factual determination on appeal, he must have either (a) prevailed on the factual issue at trial, in which case it would be up to the prosecution to appeal, not the defendant, or (b) not raised the issue at trial, in which case the trial default may be the focus of the forfeiture claim.

(B) If the facts are already part of the trial record, delay in pursuing the issue will have no effect on the testimony already presented.

(C) If the facts regarding an ineffective assistance of counsel claim are not part of the trial record, they must be presented on collateral attack rather than appeal.

(D) The laches provision of Rule 9(a) of the Federal Rule of Habeas Corpus is directed against this kind of problem. A procedural forfeiture is not necessary to enable the federal habeas corpus court to deal with it equitably.

(E) Such conniving seems unrealistic, both because its success would be on a high order of speculation and because the defendant would be serving his sentence while awaiting the fading of memories.

[21] During the delay, of course, Ross, like any defendant, was serving his sentence. Thus, he would have preferred to have the *Mullaney* principle available earlier.

[22] If the State is correct that the due process principle was apparent at the time of Ross' trial and appeal, the State could have obviated the need for a retrial by providing him a constitutionally reliable trial at that time. The delay in retrial since *Winship* is attributable to the State's failure to recognize the implications of that decision and the

had raised the *Mullaney* issue on appeal the State Supreme Court would have recognized its force and promptly reversed his conviction. Considering that *Mullaney* was not decided until five years after Ross' appeal, such a result was not likely. Indeed, after Ross' conviction had been affirmed, the North Carolina appellate courts rejected similar arguments made in *Sparks*, *Wetmore* and *Harris*. Even after *Mullaney*, the North Carolina Supreme Court would not have given Ross the benefit of that decision because it held, in *State* v. *Hankerson*, that *Mullaney* did not apply retroactively. Moreover, what could Ross have argued had he raised the issue on appeal? He could have made only a general reference to due process. He could not have cited either *Winship* or *Mullaney* because they did not yet exist. In arguing that Ross forfeited the issue by not raising it in this way, the State is insisting on a formality. The North Carolina Supreme Court would have dismissed the argument, and Ross would not have been able to get serious consideration of it in the North Carolina courts any sooner than the time that he filed his post-conviction application.

Thus, as Chief Justice Burger and Justices Powell and Rehnquist have observed, the interests supporting procedural default on appeal are considerably less forceful than the interests supporting procedural default at trial. See *Fay* v. *Noia*, 372 U.S. at 433. Although the circuits are divided on whether *Sykes* applies to the appeal stage,[23] they agree with that point.

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delay since *Mullaney* is a result of the State's resistance to giving Ross the benefit of that decision. The six year delay since Ross filed his post-conviction petition has occurred because the State values its interest in litigating the issues in this case more highly than it does its interest in an early retrial.

[23] Although recognizing that this Court has expressly not overruled *Fay* on its precise holding, *Wainwright* v. *Sykes*, 433 U.S. at 87-88; see also, *Jones* v. *Barnes*, 103 S.Ct. 3308, 3314 n.7 (1983), the Second, Fourth, Fifth, Seventh and Eleventh Circuits have applied *Wainwright* to defaults on appeal. *Forman* v. *Smith*, 633 F.2d 634, 640 (2d Cir. 1980), *cert. den.*, 450 U.S. 1001 (1981); *Cole* v. *Stevenson*,

Holcomb v. *Murphy*, 701 F.2d 1307, 1311 (10th Cir.), *cert. den.*, 103 S.Ct. 3546 (1983); *United States ex rel. Spurlark* v. *Wolff*, 699 F.2d 354, 358-359 (7th Cir. 1983) *(en banc)*; *Ford* v. *Strickland*, 696 F.2d 804, 816 (11th Cir. 1983) *(en banc)*; *Norris* v. *United States*, 687 F.2d 899, 904 (7th Cir. 1982); *Forman* v. *Smith*, 633 F.2d 634, 639-640 (2d Cir. 1980), *cert. den.*, 450 U.S. 1001 (1981). In *Wainwright*, Chief Justice Burger, concurring, wrote: "I would leave the core holding of *Fay* where it began. . . ." 433 U.S. at 94. He explained that *Fay*, involving a failure to appeal, "was never designed for, and is inapplicable to, errors—even of constitutional dimension—alleged to have been committed during trial." 433 U.S. at 92.[24]

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620 F.2d 1055, 1059 (4th Cir.) *(en banc)*, *cert. den.*, 449 U.S. 1004 (1980); *Evans* v. *Maggio*, 557 F.2d 430, 433 (5th Cir. 1977); *United States ex rel Spurlark* v. *Wolff*, 699 F.2d 354, 361 (7th Cir. 1983) *(en banc)*; see also, *Norris* v. *United States*, 687 F.2d 899, 903-904 (7th Cir. 1982); *Ford* v. *Strickland*, 696 F.2d 804, 816 (11th Cir. 1983) *(en banc)*. The Third, Sixth, and Tenth Circuits, on the other hand, have continued to apply *Fay*. *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 442 (3d Cir. 1982) *(dictum)*; *Crick* v. *Smith*, 650 F.2d 860, 867 (6th Cir. 1981); *Holcomb* v. *Murphy*, 701 F.2d 1307, 1310-1312 (10th Cir.), *cert. den.*, 103 S.Ct. 3546 (1983).

[24] In *Engle*, the Court emphasized that the procedural failure occurred at trial:

> "In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a *trial* default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the *trial court* has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the *trial's significance* by neglecting to raise a claim in *that forum*."

456 U.S. at 128-129 (emphasis added); see also, *id.* at 127 ("safeguards during the trial itself"). The Court mentioned one other consideration: "The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion." 456 U.S. at 129. That consideration was mentioned only in conjunction with those arising out of the *trial* failure.

E. North Carolina Law Does Not Require A Forfeiture For Every Procedural Default.

North Carolina law provides flexibility in the determination whether to impose a forfeiture for a procedural default. The Motion for Appropriate Relief procedure, North Carolina General Statutes section 15A-1419(a), provides the following grounds for denial, with relevant exceptions:

> "(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, *unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.*
>
> "(3) Upon a previous appeal *the defendant was in a position to adequately raise the ground or issue* underlying the present motion but did not do so." (Emphasis added)

In addition, section 15A-1419(b) provides:

> "Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious."

See *State* v. *Afflerback*, 46 N.C. App. 344, 264 S.E.2d 784, 785 (1980) (The defendant failed to give notice at the time of his guilty plea that he intended to appeal the denial of his motion to suppress evidence. Nevertheless, the court held that because the requirement to do so was "a recent interpretation of the statute which gives defendant his right to appeal and which was handed down just before this appeal was docketed, we will . . . discuss defendant's claim on the merits."); see also, *State* v. *White*, 274 N.C. 220, 162 S.E.2d 473, 479 (1968) ("provided factors beyond his control prevented him from claiming them earlier").

F. Under All The Circumstances Ross Has Met The "Cause" Standard.

In concluding that Ross met the "cause" requirement the Court of Appeals emphasized the following factors: (A) The challenged instructions had been used in North Carolina and other states for over a century and had been frequently approved by the state courts. 704 F.2d at 708. (B) "The default here occurred in the appellate process," not at trial. 704 F.2d at 708; see also, *Huffman* v. *Wainwright*, 651 F.2d 347, 352 (5th Cir. 1981). (C) "[N]o one can say that the verdict was not reached because the jurors placed the burden of persuasion upon the defendant rather than upon the state, just as they were instructed.[25] Because the burdens of persuasion of his two defenses were placed upon him, Ross did not receive a fair trial. Such major unfairness in a trial is itself a miscarriage of justice." 704 F.2d at 709. (D) Ross' appeal was concluded before *Winship* provided the "springboard from which to launch a constitutionally based objection to the charge." 704 F.2d at 708. (E) Therefore, Ross "had no reasonable basis for asserting the constutitional claim on appeal." 704 F.2d at 709.

The Ninth Circuit has followed the same approach. In *Myers* v. *Washington*, 646 F.2d 355 (9th Cir. 1981), *remanded for reconsideration in light of Engle*, 456 U.S. 921 (1982), *on remand*, 702 F.2d 766 (9th Cir. 1983), the Court found "cause" for failing to raise the *Mullaney* issue on an appeal that was completed before *Winship*. 702 F.2d at 768. The Court held that none of the considerations in *Sykes* "has any force in dealing with a situation like the appellant's, where the alleged procedural default consists of failure to raise on appeal constitutional issues that were unknown at the time the appeal was taken." 646 F.2d at 359. Similarly, in *Gibson* v. *Spalding*, 665 F.2d 863 (9th Cir. 1981), *vacated for reconsideration in light of Engle*, 456 U.S. 968 (1982), *on remand*, 703 F.2d 362 (9th Cir. 1983), a different panel of that court held that the

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[25] *Cf.*, *Connecticut* v. *Johnson*, 103 S. Ct. 969, 977 (1983).

Sykes interests were not "implicated in a situation where the procedural default consists of a failure to raise on appeal a constitutional issue that was impossible for the defendant to recognize at the time the appeal was taken." 665 F.2d at 866-866; *but see, Matias* v. *Oshiro*, 683 F.2d 318, 321 n.3 (9th Cir. 1982).

This Court followed a similar approach in *Gardner* v. *Florida*, 430 U.S. 349 (1977). In that case, the defendant did not request access to the report that the sentencing judge used in deciding to impose the death penalty despite a jury recommendation for life. The Court employed five reasons for deciding against forfeiture. (A) The issue went to the important death penalty determining process. (B) Counsel's failure could not have been a tactical decision. (C) The state supreme court has held that it reviews the entire record in capital appeals. (D) Two members of that court discussed the issue, suggesting that the entire court considered it. (E) The State did not urge forfeiture.

Fay v. *Noia* itself was a case in this pattern. Although the Court explained its result in terms of the "deliberate bypass" test, Noia did make a deliberate decision not to appeal. He testified that he did not want to burden his family with the costs. His attorney testified that Noia passed up the appeal because he was afraid that, if successful, he might get the death penalty on retrial. See 372 U.S. at 397 n.3; see also, *id.* at 471 (Harlan, J., dissenting). The instincts of the Court to grant relief to Noia are validated by the cause-and-prejudice standard: (A) The issue that Noia sought to raise was one that affected the integrity of the fact-finding process: that the principal evidence against him was a brutually involuntary confession. 372 U.S. at 395 n.1. (B) The failure occurred on appeal, and not at trial. 372 U.S. at 433. (C) The failure occurred in 1942, and this Court later issued decisions that would have protected Noia against both of the concerns that motivated his decision. In *Douglas* v. *California*, 372 U.S. 353 (1963), the Court held that an indigent defendant has a right to counsel on appeal. That decision came at the same time as *Fay* v. *Noia*,

suggesting that the Court was then sensitive to the inequity that Noia suffered as a result of the absence of that right in 1942. Later, in *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969), the Court held that due process prohibits the imposition of a more severe sentence upon a defendant after a new trial unless based on new wrongful conduct by the defendant. Thus, there was "cause" for Noia's failure to appeal because he and his attorney could not anticipate *Douglas* 21 years later and *Pearce* 27 years later.

This case involves the constitutional invalidity of a state policy with a long tradition that was shared with many other states. It is not a challenge to an isolated incident. The entire institutional structure of the state judicial system failed to notice the unconstitutionality of its practice despite its frequent and general application before and even after *Winship*. Although the State's courts, judges, and prosecutors had at least equal responsibility with its defense attorneys for assuring the conformity of their law with the Constitution, they failed to recognize the violation. See *Gardner* v. *Florida*, 430 U.S. at 361 n.12 ("The Supreme Court of Florida decided petitioner's case before our decision in *Proffitt* v. *Florida* . . . . Therefore, we cannot join Mr. Justice Marshall's criticism of the Florida courts for their failure to follow the teaching of those cases.") see also, *Murch* v. *Mottram*, 409 U.S. 41, 45-47 (1972) (finding deliberate by-pass where the state court advised defendant of the consequences of withdrawing a claim from a post-conviction petition).[26] The constitutional violation

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[26] Several commentators have suggested that the state should have responsibility at least for giving a defendant "notice" before his default can amount to a federal forfeiture. Gibbons, "Waiver: The Quest for Functional Limitations on Habeas Corpus Jurisdiction," 2 Seton Hall L. Rev. 291, 308-309 (1971); Rosenberg, "Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel," 62 Minn. L. Rev. 341, 413 (1978); Spritzer, "Criminal Waiver, Procedural Default and the Burger Court," 126 U. Pa. L. Rev. 473, 513 (1978).

is clear, even conceded, on the record of the trial. There is no need for an evidentiary hearing to adjudicate any dispute. *Cf.*, *Bowen* v. *Johnston*, 306 U.S. 19, 26-27 (1939). To deny Ross the benefit of *Mullaney*, relieving him from a conviction that is conceded to be constitutionally unfair and unreliable, because of his excusable failure to claim it on appeal before it was decided, and even before *Winship* laid the groundwork for it, would exalt over justice a procedural rule that has no justification on the facts of this case.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

BARRY NAKELL
Court-appointed
Counsel for Respondent

EXHIBIT A

SPECTRUM OF PROCEDURAL FAILURES BY THE DEFENSE IN A STATE CRIMINAL CASE

Ineffective assistance of counsel	Serious neglect by counsel	Inadvertence, negligence, or lack of due diligence by counsel		Judgment decision of counsel		Retroactive change in the law previously unavailable to counsel with reasonable diligence
		(a) Developing change in the law being raised in the courts and in the literature, with the foundation doctrine already developed	(b) No explanation	(a) No explanation	(b) Tactical or strategy decision	Important new evidence previously unavailable to counsel with reasonable diligence
		Engle v. *Isaac*		*Davis v. United States* (1973) *Francis v. Henderson* *Wainright v. Sykes*	*Estelle v. Williams* *Henry v. Mississippi*	Reform of Federal Intervention in State Proceedings Act, S. 1763, 98th Cong., passed Senate on February 6, 1984 *O'Connor v. Ohio* *Smith v. Yeager* *Davis v. United States* (1974) *Reece v. Georgia* *Carter v. Texas* *Johnson v. Bennett*
			Not "cause"			"Cause"

EXHIBIT B

MULLANEY V. WILBUR TIME LINE

1952	March 1969	Oct. 1969	1970	Beginning in 1970	1971	1972	1973 and 1974	Oct. 1974	1974
Leland v. Oregon	Ross' trial	Ross' appeal	* * * IN RE WINSHIP * * *	Law review articles	State v. Wilbur	District court	Mullaney v. Wilbur Court of Appeals	Certiorari granted	State v. Sparks; Wetmore; Harris

EXHIBIT B
Page Two

MULLANEY V. WILBUR TIME LINE

Jan. and April 1975	June 1975	Sept. 1975	1975	1977	1978	1978	1979	1982
	* * *							
Engle, two of the trials	MULLANEY v. WILBUR	Engle, one of the trials	State v. Hankerson	Hankerson v. North Carolina	State v. Hancock	Ross' post-conviction petition	Wynn v. Mahoney	State v. Bush
	* * *							

No. 83-218

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS

v.

DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether respondent, a federal habeas petitioner, should be excused from his procedural default in state court on the ground that the constitutional claim he now wishes to assert—based on *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975)—was "novel" at the time his conviction became final in 1969.

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INTEREST OF THE UNITED STATES

This case raises an important question concerning the availability of federal habeas corpus relief when a defendant has failed to comply with legitimate procedural rules requiring that claims be timely raised or forfeited. The Federal Rules of Criminal Procedure expressly provide that certain types of claims must be raised before or at trial. See Fed. R. Crim. P. 12, 30; see also Fed. R. Evid. 103(a)(1). More generally, a criminal defendant's failure to make timely objection at trial is frequently held to bar the claim, although on direct appeal an appellate court may sometimes notice plain error affecting substantial rights. Fed. R. Crim. P. 52(b). See, *e.g.*, *United States* v. *Indiviglio*, 352 F.2d 276, 279-281 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). Failure to take an appeal or preserve a particular claim on appeal can also bar subsequent litigation of the claim. *Sunal* v. *Large*, 332 U.S. 174 (1947); *Norris* v. *United States*, 687 F.2d 899 (7th Cir. 1982).

The standard for determining when an error that was not duly objected to at trial or raised on direct appeal can nevertheless support collateral relief is of substantial importance to the administration of justice in the federal system. The holding of the court of appeals in this case—that the constitutional infirmity of a jury instruction was a "novel" conception six years before this Court decided the issue, and that such novelty was sufficient cause to excuse a failure to make timely objection—if sustained by this Court, would substantially increase the susceptibility of otherwise final judgments in federal criminal cases to collateral attack.

STATEMENT

1. Respondent shot and killed his wife on November 1, 1968. The evidence at trial showed that respondent was then separated from his wife and living in New York; his wife was living at her mother's home in Raleigh, North Carolina. On November 2, respondent appeared with his sister at the home in Raleigh. They took respondent's wife and two children to a shopping center, and on their return respondent and his wife entered the house. His wife's brother, Leon Young, testified that he was outside at the time, and heard two shots. Young ran to the house and saw respondent come out, reload his gun, and shoot his wife again. According to Young, respondent's wife " 'did not have a weapon of any kind * * *.' " *State* v. *Ross*, 275 N.C. 550, 551, 169 S.E.2d 875, 876 (1969). Young testified that respondent then " 'ran to his sister's car, said something about the hospital, and they drove away. I did not see any injuries on [respondent]' " (*ibid.*). Young's testimony was corroborated by Charles McAllister, who was in the house at the time (*ibid.*).

Respondent himself testified that after returning from the shopping center he and his wife "had a conversation about a girl that I used to mess around with" (J.A. 18). As he was leaving the room, respondent continued, his wife stabbed him in the back of the neck with "a knife,

fork, or something" that Young had handed to her (*ibid.*). He then turned around and shot her twice. As he was leaving he fired another shot at Young who, he testified, was approaching him "with some object in his hand" (*ibid.*). Respondent's sister corroborated his statement "that he had a profusely bleeding wound on his neck" (169 S.E.2d at 877).

The trial court instructed the jury that respondent had the burden of proving self-defense (which would have exonerated him entirely) and lack of malice (which would have affected the degree of the offense) (Pet. App. 2; J.A. 23-24). The jury returned a verdict of guilty of murder in the first degree, and recommended life imprisonment. The North Carolina Supreme Court affirmed the conviction on October 15, 1969. *State* v. *Ross*, *supra*.

2. Respondent did not object either at trial or on appeal to the court's instruction on the burden of proof. Subsequently, in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), this Court held that in a murder case the prosecution must prove beyond a reasonable doubt that the defendant did not act on sudden provocation or in the heat of passion. In *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), on direct review of a conviction, the Court held that *Mullaney* applied retroactively to a trial that took place in 1974. Respondent then unsuccessfully sought post-conviction relief in state court, relying on *Mullaney* and *Hankerson* (Pet. Br. App. A3-A8).

Thereafter, respondent began this proceeding under 28 U.S.C. 2254. The district court held that it was barred from considering the petition because the State itself would not permit post-conviction consideration of claims not raised either at trial or on appeal (Pet. App. 3). The court of appeals dismissed respondent's appeal. *Ross* v. *Reed*, 660 F.2d 492 (4th Cir. 1981). This Court vacated the judgment, however, and remanded for further consideration in light of *Engle* v. *Isaac*, 456 U.S. 107 (1982), and *United States* v. *Frady*, 456 U.S. 152 (1982). *Ross* v. *Reed*, 456 U.S. 921 (1982).

On remand the court of appeals reversed and directed that a writ of habeas corpus issue unless respondent was retried within a reasonable time (Pet. App. 9). The court found that respondent's failure to object to the burden of proof instruction either at trial or on direct appeal was excused under the "cause and prejudice" rule applied in *Isaac* and *Frady*. The State itself conceded that the prejudice requirement was satisfied, since both respondent and his sister gave testimony suggesting that respondent had reacted to an attack on him by his wife. Under those circumstances, imposing the burden of persuasion on respondent could have influenced the jury's verdict (Pet. App. 5).

The court also held that respondent had shown cause for his failure to object, because the claim that he now asserts was too novel in 1969 for him to have anticipated. *Mullaney* was not decided until 1975; and even *In re Winship*, 397 U.S. 358 (1970) (prosecution must prove every element of the offense beyond a reasonable doubt), was not decided until five months after respondent's conviction had been affirmed by the state supreme court (Pet. App. 2, 6). In 1969, the court stated, those decisions were only "foreshadowed by straws in the wind" (*id.* at 7). To require objection on direct appeal under those circumstances,[1] it concluded, would oblige counsel "to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post conviction relief upon some future, unforeseen development in the law" (*id.* at 7-8).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a Section 2254 petitioner who has failed to raise a constitutional claim at trial or on direct appeal, and who therefore is barred from presenting the claim in state court, has shown cause

[1] According to the State's petition, contemporaneous objection was not required at trial, but was on direct appeal, in order to preserve review of jury instructions (Pet. 3).

for his procedural default (see *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977)) on the basis that the claim was novel at the time of his trial and direct appeal (see *Engle* v. *Isaac*, 456 U.S. at 131). As a preliminary matter, we note several aspects of the case that we do not address.

First, although the orders dismissing respondent's state petition for post-conviction review (Pet. Br. App. A3-A4) and subsequent petition for a writ of certiorari (*id.* at A8) do not reveal the basis for denial, we assume for the reasons given by petitioner (Pet. Br. 10-12) that the State enforced its procedural default rule in this case.

Second, we doubt that there is merit to respondent's suggestion (Br. in Opp. 3) that the state supreme court abandoned its right to rely on the state default rule by examining the charge to the jury for plain error on its own initiative. See *State* v. *Ross*, 275 N.C. at 554, 169 S.E.2d at 878. The fact that an appellate court is willing to engage in the commendable practice of examining a record for plain error should not carry with it the penalty of opening the case up to collateral attack on any issue the court may have overlooked. See also *McLaughlin* v. *Gabriel*, No. 83-1413 (1st Cir. Jan. 27, 1984), slip op. 4-6.

I

A. Respondent's claim that the state has the burden of persuasion on the issues of malice and self-defense was not novel in 1969. The great majority of state courts addressing those issues by 1969 had already imposed that burden on the prosecution. Though their decisions were not explicity based on the Due Process Clause, their views and reasons "reflect a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. at 361-362 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968)). Federal cases during the same period, following the burden of proof rule announced in *Davis* v. *United States*, 160 U.S. 469 (1895), regarded the government's burden of proof beyond a reasonable doubt as so fundamental that it was a tenet of due process. Considered collectively, these cases

provided "the tools to construct the[] constitutional claim." *Engle* v. *Isaac*, 456 U.S. at 133.

B. Given the weight of authority on the allocation of the burden of proof by 1969, it is entirely proper that respondent should be bound by his procedural default. *Engle* holds that a habeas petitioner does not establish cause simply by showing that the state court would in all probability have rejected the claim. 456 U.S. at 130. It also holds that the inadvertence or neglect of counsel—at least in cases falling short of constitutionally ineffective assistance—cannot excuse a procedural default.

These principles are applicable to a default on direct appeal (the situation here) just as they are to defaults at trial. A rule requiring that issues be raised on direct appeal furthers the state's interest in avoiding piecemeal review of convictions. More important, such a rule makes it possible to correct trial court errors promptly enough to permit effective retrial. Filing a Section 2254 action after neglecting to present an important issue on direct appeal also deprives the federal court of the benefit of the state court's views on the record and issues of state law.

II

A. It is no accident that the issue decided in *Mullaney* and made fully retroactive in *Hankerson* should not have been novel at the time of respondent's trial and appeal. In fact, the principles governing retroactivity in themselves assure that procedural rights made fully retroactive will not have been novel when cases now on collateral review were tried. Such rights, essential as they must be to the truth-finding process at trial, are read into the Constitution precisely because they are "implicit in the concept of ordered liberty," and can therefore "be traced in our history, political and legal." *Palko* v. *Connecticut*, 302 U.S. 319, 325, 327 (1937). Retroactive application thus has "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." *Johnson* v. *New Jersey*, 384 U.S. 719, 731 (1966).

B. The unlikelihood that novelty can be demonstrated for any rights made fully retroactive suggests that an inquiry into that issue will be unproductive. Moreover, the mass of materials relevant to a decision, and the lack of any definite standard for deciding exactly when a claim can last have been considered novel, provide further reasons for avoiding such a burdensome and speculative inquiry unless justice demands it.

If one were to conclude that a habeas petitioner's claim was novel at the time of his conviction, then it is difficult to see how its violation could have rendered his trial "fundamentally unfair." *Engle* v. *Isaac*, 456 U.S. at 131. After all, the very idea of novelty implies that the entire legal system at the time viewed the procedures used to convict as constitutionally proper. The rule adopted by the court of appeals has the ironic effect of overturning convictions obtained in compliance with contemporary standards at the time of trial, while leaving intact those (later obtained) which violate the standards applicable to the later trials. This rather perverse willingness to undo more ancient, rather than more recent, convictions is precisely the opposite of the approach our legal system takes toward newly discovered evidence. Fed. R. Crim. P. 33.

ARGUMENT

The issue in this case is similar to that decided in *Engle* v. *Isaac*, 456 U.S. 107 (1982). There the respondents, two of whom had been convicted before this Court's decision in *Mullaney* v. *Wilbur*, argued that they had shown cause for their failure to object to jury instructions imposing on them the burden of proving self-defense, because the constitutional objection validated in *Mullaney* was "unknown at the time of trial." 456 U.S. at 131. This Court stated (456 U.S. at 131) (footnotes omitted):

> We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraor-

> dinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair. These concerns, however, need not detain us here since respondents' claims were far from unknown at the time of their trials.
>
> * * * * *
>
> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

The respondents in *Isaac* were tried in 1975, and this Court held (456 U.S. at 131) that by that date *In re Winship*, 397 U.S. 358 (1970), provided a "basis for their constitutional claim." Respondent here was convicted, and his conviction was affirmed by the state supreme court, in 1969. The issues are thus: (i) whether an issue that was not novel in 1975 was so in 1969; and if it was, (ii) whether novelty establishes cause for respondent's failure to object to the jury instructions on self-defense and malice.

We view these issues of novelty and procedural default, as we must, against the background of evolving substantive law and principles of retroactivity. For it is inevitable that this Court's willingness to accept changes in constitutional doctrine concerning the rights of criminal defendants, and its willingness to make new doctrine retroactive, must both be affected by the perceived systemic costs of such new doctrine, particularly decisions about how much respect to accord legitimate procedural default rules. A decision such as *Mullaney* announcing a constitutional rule about the allocation of the burden of proof has important consequences for future criminal trials. Making such a rule fully retroactive when the claim has been duly considered but erroneously rejected by

the lower courts, as *Hankerson* states should be done, widens somewhat the circle of cases affected. But the consequences of enlarging that circle further to encompass past cases in which the issue was not even preserved are likely to be a great deal more serious than this Court envisioned in *Hankerson*. The Court there noted, addressing this very issue (432 U.S. at 244 n.8):

> [W]e are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as [North Carolina] asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as [North Carolina] asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, *e.g.*, Fed. Rule Crim. Proc. 30.

If the Court should conclude in this case that such "normal and valid rule[s]" insulate only the most recent convictions, it will have expanded greatly the impact that fully retroactive decisions have on the administration of criminal justice.

I. RESPONDENT'S CONSTITUTIONAL CLAIM WAS NOT NOVEL IN 1969

A. Respondent's Claim That The State Had The Burden Of Proof, Though Not Yet Validated By This Court, Was Frequently Litigated And Widely Accepted In 1969

The court of appeals excused respondent's procedural default because it concluded that in 1969 a claim that the prosecution had the burden of proving malice and disproving self-defense was "novel," foreshadowed only by a

"hint here and there voiced in other contexts" (Pet. App. 7). In fact, however, such claims were frequently litigated in both state and federal courts, and by the time of respondent's trial the majority of courts reaching the issue had held instructions imposing the burden of persuasion on the defendant to be improper.

This Court recognized as much in *Mullaney* (421 U.S. at 693-696), noting that the clear trend in the states since early in this century had been away from the rule of *Commonwealth* v. *York*, 50 Mass. 93 (1845), which imposed on a defendant the burden of persuasion to negate malice aforethought. Our research reveals that as of 1969, at least 19 states imposed the burden of persuasion on the prosecution to establish malice;[2] only eight agreed with North Carolina's requirement that a defendant shoulder the persuasion burden.[3] The same is true with respect the burden of persuasion on self-defense.[4] At the time of respondent's trial no fewer than 23 states agreed that the burden of persuasion rested on the state, and that a defendant had at most the burden of producing some evidence on that defense.[5] Five more required the defendant simply to raise a reasonable doubt on that issue—a requirement that differs in little more than form from the majority rule.[6] Only 12 states (including North Carolina) placed the persuasion burden on a defendant.[7]

To be sure, these state cases do not hold that allocation of the persuasion burden to the prosecution is required by the Due Process Clause of the Fourteenth

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[2] See App. *infra*, 1a-2a.

[3] See App. *infra*, 3a.

[4] Though this Court has not held that the Constitution requires the prosecution to negate a claim of self-defense, *Mullaney* also recognized that the "majority rule" in the states imposed the burden of persuasion on the prosecution (421 U.S. at 702 n.30).

[5] See App. *infra*, 4a-6a.

[6] See App. *infra*, 7a.

[7] See App. *infra*, 8a-9a.

Amendment. But individually and collectively they go far toward establishing that conclusion. Considered singly, many of them indicate that imposing the burden of proving malice and disproving self-defense on the prosecution is demanded by considerations of fairness fundamental to our system of justice[8]—the very standard *Mullaney* applied in deciding the constitutional issue. See 421 U.S. at 701 ("the traditional burden which our system of criminal justice deems essential"). Taken together, the weight of opinion expressed in these cases "'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.'" *In re Winship*, 397 U.S. at 361-362, quoting *Duncan* v. *Louisiana*, 391 U.S. at 155.[9]

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[8] See, *e.g.*, *State* v. *Wilcox*, 48 S.D. 289, 204 N.W. 369, 372 (1925), where, in overruling the former state practice requiring a defendant to prove self-defense by a preponderance of the evidence, the court observed that allocating only a production burden to a defendant and requiring the prosecution to retain the burden of persuasion "seems to us to be a more humane and reasonable rule." And in *Wright* v. *People*, 4 Neb. 407, 409 (1876), the court said, in adopting a rule requiring the prosecution to prove a defendant's sanity: "[W]e feel at liberty to adopt that rule which to our mind seems, not only to be founded in reason, but, to conform to those humane principles which underlie our system of criminal laws." The rule in *Wright* was later relied on to allocate the burden of persuasion concerning a claim of self-defense to the prosecution. *Gravely* v. *State*, 38 Neb. 871, 57 N.W. 751, 752 (1894). And an opinion that was frequently cited in the late 19th and early 20th centuries stated that "[i]t is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor." *Stokes* v. *People*, 53 N.Y. 164, 181 (1873) (Rapallo, J., concurring). In fact, the author viewed that rule to be so fundamental that he believed an instruction shifting the burden of proof to a defendant could never be harmless, because it was "so vital" (*id.* at 183).

[9] This is not to suggest that the potential connection between these cases and the demands of the Constitution was not perceived. For example, the initial draft of the ALI's Model Penal Code dealing with the burden of proof required the prosecution to prove "each element of [an] offense * * * beyond a reasonable doubt," save for certain exceptional defenses "plainly require[d]" by

The treatment of these issues in the federal courts lends still more support to the conclusion that the point was far from novel by the date of respondent's trial and appeal. Several federal courts, following the rule announced in *Davis* v. *United States*, 160 U.S. 469 (1895), regarded the requirement that the government prove all elements of an offense beyond a reasonable doubt as so fundamental that it was a tenet of due process.[10] And as this Court has already recognized (*Engle* v. *Isaac*, 456 U.S. at 131-132 n.39), even before *Winship* the Eighth Circuit had held that the Iowa practice of requiring a defendant to prove the defense of alibi violated due process. *Stump* v. *Bennett*, 398 F.2d 111 (en banc), cert. denied, 393 U.S. 1001 (1968). The court in *Stump* correctly observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law" (398 F.2d at 122). See also *McLaughlin* v. *Gabriel*, *supra*, slip op. 6-7.

B. Since Respondent's Claims Were Not Novel, He Is Bound By His Procedural Default

Given the voluminous litigation prior to 1969 concerning the placement of the burden of proof, novelty affords no just cause to excuse respondent from his failure to

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statute. Model Penal Code § 1.13(1) and (2)(b) (Tent. Draft No. 4, 1955). And the comments on that section state that "to impose a burden of persuasion on defendants as to matters involved in their guilt or innocence of an offense ought to be viewed as raising a more serious issue of constitutionality than the mere imposition of a burden of adducing evidence." *Id.* at page 113. Though the draft went on to say that "due process poses no impenetrable barrier to shifting the burden of persuasion" if done under "conservative" limitations (*ibid.*), it suffices for purposes of the question here that the issue was recognized many years before respondent's trial, not that the result in *Mullaney* was accepted.

[10] See Appendix *infra*, 10a. Indeed, *Winship* itself expressed the view that *Davis*'s burden of proof rule had constitutional roots. 397 U.S. at 362-363. But see *Leland* v. *Oregon*, 343 U.S. 790, 797 (1952).

raise the issue at trial or on direct appeal. We note, as an initial matter, the irrelevance of the fact that respondent's attorney (rather than he himself) may have borne the responsibility for recognizing and raising the point. For "the decision to assert or not to assert constitutional rights or constitutionally based objections at trial is necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial." *Wainwright* v. *Sykes*, 433 U.S. at 93 (Burger, C.J., concurring). See also *id.* at 95 n.2 (Stevens, J., concurring).[11]

Neither can the decision about "cause" for respondent's procedural default turn on the reasons (or lack of them) behind his counsel's failure to raise the issue. It can no longer be argued, after this Court's decision in *Engle* v. *Isaac*, that the default is excused simply because the state supreme court in all likelihood would have rejected the claim—as, indeed, it rejected a few years later the claim of the defendant in *Hankerson*. "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." 456 U.S. at 130 (footnote omitted). The decision not to argue an issue under those circumstances is no different from litigation judgments that counsel must make in every case. If a lawyer has several points to make at trial or on appeal, any one of which might be dispositive, he will often refrain from making others that are less promising on the theory that

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[11] See also *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976); *id.* at 513-515 (Powell, J., concurring); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671, 679 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972). See generally *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 149-150 (1970).

raising a borderline claim may divert attention from or dilute the force of other arguments he deems more likely to succeed. See *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983), slip op. 6-9.[12]

Indeed, even if one assumes that counsel's inaction resulted from inadvertence or negligence, there is not sufficient cause to excuse a procedural default—at least in situations falling short of constitutionally ineffective assistance of counsel. The possibility that an attorney may make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and ordinarily even "erroneous" decisions by counsel must be deemed binding. See *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 512 (1976); *id.* at 514-515 & nn.3, 4 (Powell, J., concurring). Addressing this very contention in *Engle* v. *Isaac*, 456 U.S. at 134, the Court observed:

> We have long recognized * * * that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

These principles are not only inherent in an adversary system, but warranted by "the demands of comity and finality" recognized in *Engle* v. *Isaac*. Enforcement of a contemporaneous objection rule, for example, promotes a system in which both the prosecution and the trial court have an opportunity to consider the wisdom of pursuing a particular position. If a defendant objects to the court's jury instruction (either during a charge con-

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[12] For these reasons, we do not share the court of appeals' concern (Pet. App. 7) about the incremental effect of enforcing a procedural default in cases like this on the defense counsel's choice of issues to preserve at trial and on appeal.

ference or immediately after the jury is instructed), the court is afforded a chance to determine whether to give (or if necessary to correct) a potentially erroneous charge. If the defendant objects to the admission of evidence he may succeed in getting it excluded, or the prosecutor may reconsider his proffer rather than risk reversal by either a state appellate court or a federal habeas court. If a questionable statement is made during summation, a contemporaneous objection gives the trial court an opportunity to cure any possible error by appropriately cautioning the jury.

If a defendant prevails on his objections, he may succeed as well in securing an acquittal from the jury. If he prevails and is convicted, the timely objection will at least have reduced the number of points to be reviewed on appeal. And even if the objection is denied, it will often serve the purpose of enabling the trial judge to make a record on a claim when the recollection of the witnesses and parties is freshest. A reviewing court will thus have a better opportunity to weigh the merits of a claim of error. See *Wainwright* v. *Sykes*, 433 U.S. at 88-89; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). "Any procedural rule which encourages the result that [trial] proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification." *Wainwright* v. *Sykes*, 443 U.S. at 90.

Nor do we think that there is any reason for giving such respect to state contemporaneous objection rules but ignoring this State's "equivalent interests in discouraging procedural defaults during appellate proceedings" (Pet. App. 4). See note 1, *supra*. In the latter case the state has an obvious interest in avoiding piecemeal review of convictions—first on direct appeal, then later in a state-court collateral attack. More important, a rule that objections must at least be raised on direct review makes it possible to correct trial court errors promptly enough to permit effective retrial. Here, for example, direct review in the state supreme court was completed in 1969, within

months of respondent's conviction. It was not until 1977 that a collateral attack raising this issue was first brought in state court. Moreover, one who files a Section 2254 action after neglecting to present an important issue on direct appeal deprives the federal court of the benefit of the state court's views on the record and issues of state law. What the State in this case has done by excusing a default at the trial level but enforcing it if the claim is not raised on appeal is simply to adopt a more lenient procedural default rule than it might have chosen. That circumstance should hardly entitle a federal habeas court to ignore the core interests that the State *does* insist on protecting. For these reasons the courts of appeals have generally found little reason to distinguish between defaults at trial and those on direct appeal.[13] This Court too has found the preservation of a claim on direct appeal critical to its availability on collateral attack. Compare *Sunal* v. *Large*, 332 U.S. 174 (1947), with *Davis* v. *United States*, 417 U.S. 333, 345 (1974).

There are, of course, cases where the "cause" requirement of *Wainwright* v. *Sykes* will be satisfied. If, for example, a defendant is denied a fair opportunity to raise his claim in accordance with applicable procedural rules (*e.g.*, if the trial court refuses to entertain objections to jury instructions), that contention would still be available on collateral review, if preserved on direct appeal.[14] In

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[13] *Forman* v. *Smith*, 633 F.2d 634, 636-640 (2d Cir.), cert. denied, 450 U.S. 1001 (1981); *Cole* v. *Stevenson*, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S. 1004 (1980); *Huffman* v. *Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981); *Evans* v. *Maggio*, 557 F.2d 430, 433-434 (5th Cir. 1977); *Ford* v. *Strickland*, 696 F.2d 804, 816-817 (11th Cir. 1983). Cf. *Hubbard* v. *Jeffes*, 653 F.2d 99, 101 n.2 (3d Cir. 1981); *Matias* v. *Oshiro*, 683 F.2d 318, 321 & n.3 (9th Cir. 1982). Contra, *Holcomb* v. *Murphy*, 701 F.2d 1307, 1309-1311 (10th Cir. 1983). For an excellent discussion of the principles applicable to such cases, see *Norris* v. *United States*, 687 F.2d 899, 901-904 (7th Cir. 1982) (collateral attack on federal conviction).

[14] See *White* v. *Estelle*, 586 F.2d 500 (5th Cir. 1978). Cf. *Rose* v. *Mitchell*, 443 U.S. 545, 561, 563 (1979); *Stone* v. *Powell*, 428 U.S. 465 (1976); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Sunal* v. *Large*,

those circumstances the possibility of injustice is plain, and the state's interest, if any, in generally enforcing unfair or unreasonable procedural rules is plainly outweighed by the defendant's right to a fair opportunity to raise his claims. There may well be other "exceptional circumstances" (*Wainwright* v. *Sykes*, 433 U.S. at 91 & n.14) that would satisfy the "cause" requirement. But it is unnecessary to speculate as to what they might be, since it is clear that this case, like *Engle* v. *Isaac*, is not such an instance.

II. THE PRINCIPLES GOVERNING RETROACTIVITY SUGGEST THAT NOVELTY CAN NEVER BE "CAUSE" JUSTIFYING A PROCEDURAL DEFAULT

In Part I we have argued that respondent's claim was not novel at the time of his trial and direct appeal—a point sufficient to dispose of this case. We believe, however, that it is possible to state a clearer rule resolving not only this case, but also similar problems that may arise in the future. We argue below that the principles governing retroactivity, which reflect the gradual character of evolution of legal doctrine, assure that there will be few, if any, constitutional claims that are "novel" as applied to cases on collateral review. Moreover, even if that is not so, we further argue that novelty should never qualify as "cause" for a procedural default.

Whether the novelty of a constitutional claim can be cause for a procedural default is an issue that arises only when this Court has both upheld the claim on the merits and made it fully retroactive to cases on collateral review. The court of appeals here noted that *Mullaney* v. *Wilbur* applied retroactively to cases tried in 1969, but then held that the claim validated in *Mullaney* was too novel to be perceived and litigated in such cases

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332 U.S. 174, 182-183 (1947); *Boyd* v. *Mintz*, 631 F.2d 247 (3d Cir. 1980). See generally *Dumont* v. *Estelle*, 513 F.2d 793, 797 (5th Cir. 1975). See also *Pedrero* v. *Wainwright*, 590 F.2d 1383 (5th Cir. 1979); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050 (1978).

(Pet. App. 3, 5-7). These two conclusions are inconsistent. Implicit in the notion of full retroactivity is the idea that trials conducted in violation of the retroactive rule were so defective when held that they must be done over again (or simply nullified and not rerun). But it is difficult to imagine how a proceeding could be fatally flawed for a reason so novel that it was inconceivable to the participants.

A. Procedural Rights Made Fully Retroactive Are By Their Nature Not Novel As Applied To Cases On Collateral Review

1. Those newly recognized criminal procedural rights which this Court has made fully retroactive have all been designed "to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials * * *." *Hankerson* v. *North Carolina*, 432 U.S. at 243.[15] Of course "whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey*, 384 U.S. 719, 728-729 (1966); *Stovall* v. *Denno*, 388 U.S. 293, 297-299 (1967). And where the effect of the old rule has not been serious and substantial enough, a de-

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[15] The other class of decisions that have been made fully retroactive embraces cases "ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place. * * * In such cases, the Court has relied less on the technique of retroactive application than on the notion that the prior inconsistent judgments or sentences were void *ab initio*." *United States* v. *Johnson*, 457 U.S. 537, 550 (1982). Examples are *Ashe* v. *Swenson*, 397 U.S. 436, 437 n.1 (1970) (retroactive application of double jeopardy ruling in *Benton* v. *Maryland*, 395 U.S. 784 (1969)); *Moore* v. *Illinois*, 408 U.S. 786, 800 (1972) (retroactive application of Eighth Amendment ruling in *Furman* v. *Georgia*, 408 U.S. 238 (1972)). See also *Michigan* v. *Payne*, 412 U.S. 47, 61-62 (1973). But cf. *Gosa* v. *Mayden*, 413 U.S. 665 (1973).

cision supplanting it will not be made fully retroactive (*ibid.*). But rights that do have a sufficient impact on the determination of guilt are not cut by this Court from whole cloth. The allocation of the burden of proof, for example (as we have shown above), is a matter that courts trying and reviewing criminal cases had to consider on innumerable occasions. And though their decisions were not unanimous, many reached the same conclusion ultimately validated by this Court.

This inverse relationship between retroactivity and novelty is well recognized. It is typically expressed by noting that rights made fully retroactive, because of their importance to truth-finding, have had the sanction of history and tradition. Rules that make a clear break with precedent, on the other hand, however important they may be for reasons unrelated to the determination of guilt, are limited to prospective application or are retroactive only to cases pending on direct review. Thus,

> if the purposes of a new rule implicate decisively the basic truth-determining function of the criminal trial, then * * * the rule should be given full retroactive application, for the required constitutional procedure itself would then stand as a concrete embodiment of "the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937).

Williams v. *United States*, 401 U.S. 646, 666 (1971) (Marshall, J., concurring in part and dissenting in part). Justice Harlan came to a similar conclusion. He would have denied full retroactivity to rules of constitutional criminal procedure, with the exception of "those procedures that * * * are 'implicit in the concept of ordered liberty.'" *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring and dissenting) (quoting *Palko* v. *Connecticut*, 302 U.S. at 325). See also *Hankerson* v. *North Carolina*, 432 U.S. at 248 n.2 (Powell, J. concurring). But as *Palko* itself noted, rights "implicit

in the concept of ordered liberty" are " 'rooted in the traditions and conscience of our people' " and "can be traced in our history, political and legal." 302 U.S. at 325, 327. In short, retroactive application has "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." *Johnson* v. *New Jersey*, 384 U.S. at 731.

By contrast, the Court's most recent treatment of retroactivity in the criminal context notes that

> where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," * * * it almost invariably has gone on to find such a newly minted principle nonretroactive. See *United States* v. *Peltier*, 422 U.S. 531, 547, n.5 (1975) (Brennan, J., dissenting) (collecting cases). In this * * * type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the " 'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course" * * *.

United States v. *Johnson*, 457 U.S. 537, 549 (1982). See also *Tehan* v. *United States ex. rel. Shott*, 382 U.S. 406, 410-412, 417 (1966). That observation, the Court held, "is not inconsistent with our precedents giving complete retroactive effect to constitutional rules whose purpose is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function" (457 U.S. at 562 n.21). The reason, of course, is that those precedents were not "newly minted" (*id.* at 549), but anticipated far in advance of this Court's decisions.

2. A brief review of the procedural rights this Court has held fully retroactive substantiates these conclusions. Such rights have been essential to the integrity of the truth-finding process, have been deemed implicit in the concepts of ordered liberty and fundamental fairness, and have been clearly foreshadowed in the law's earlier development.

One class of such rights concerns the allocation and standard of proof. The former is the issue here and in *Hankerson* v. *North Carolina* (holding *Mullaney* v. *Wilbur* retroactive). The latter was at issue in *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972) (holding *In re Winship* retroactive). Each procedure is "a prime instrument for reducing the risk of convictions resting on factual error." [16] Each is also considered " 'essential for the protection of life and liberty' " and required by notions of " 'fundamental fairness.' " [17] And for that reason it is not surprising that each was clearly foreshadowed by earlier decisions of this and other courts.[18]

A second group of rights concerns the composition and unanimity of juries.[19] The selection of a jury partial to capital punishment "undermine[s] 'the very integrity of the . . . process' that decides [a defendant's] fate[.]" [20] Similarly, a nonunanimous six-person jury "poses a * * * threat to the truth-determining process itself." [21] The former practice, the Court noted, ignores "basic requirements of procedural fairness." [22] The latter was a distinctly idiosyncratic innovation whose invalidity "was distinctly foreshadowed" by this Court's earlier decisions.[23]

A third class of rights made fully retroactive includes matters crucial to the correct functioning of the trial

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[16] *In re Winship*, 397 U.S. at 363; *Hankerson*, 432 U.S. at 241.

[17] *In re Winship*, 397 U.S. at 362, 363; see also *id.* at 373 n.5 (Harlan, J., concurring); *Hankerson*, 432 U.S. at 241.

[18] See *In re Winship*, 397 U.S. at 362-363; see pages 9-12, *supra*.

[19] The former was the issue in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (declaring its own holding fully retroactive, *id.* at 523 n.22). The latter was in question in *Brown* v. *Louisiana*, 447 U.S. 323 (1980) (holding *Burch* v. *Louisiana*, 441 U.S. 130 (1979), retroactive to a case pending on direct review).

[20] *Witherspoon*, 391 U.S. at 523 n.22.

[21] *Brown* v. *Louisiana*, 447 U.S. at 334 (opinion of Brennan, J.).

[22] *Witherspoon*, 391 U.S. at 521 n.20.

[23] *Brown* v. *Louisiana*, 447 U.S. at 335-336 (opinion of Brennan, J.); see *Burch* v. *Louisiana*, 441 U.S. at 134-138.

process—the right of confrontation and the exclusion of involuntary confessions. The former right is denied when the prosecution introduces preliminary hearing testimony of a witness it has not subpoenaed, or a co-defendant's confession implicating the defendant—practices that "present[] a serious risk that the issue of guilt or innocence may not [be] reliably determined." [24] The latter is ignored when the voluntariness of confessions is left solely for the jury's determination—a practice that may "infect the jury's findings of fact" concerning both voluntariness and guilt.[25] Both rights have been characterized as among the " 'fundamental principles of constitutional liberty.' " [26] And the Court's condemnations of these practices applied retroactively because the decisions were "clearly foreshadowed," [27] or at least in conformity with the "orthodox rule." [28]

The fourth class of rights made fully retroactive by this Court concerns the right to counsel, not only at trial,[29]

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[24] *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968) (holding *Bruton* v. *United States*, 391 U.S. 123 (1968), retroactive); *Berger* v. *California*, 393 U.S. 314 (1969) (holding *Barber* v. *Page*, 390 U.S. 719 (1968), retroactive to a case on direct appeal).

[25] *Jackson* v. *Denno*, 378 U.S. 368, 383 (1964), held retroactive in *McNerlin* v. *Denno*, 378 U.S. 575 (1964).

[26] *Bruton* v. *United States*, 391 U.S. at 135; *Barber* v. *Page*, 390 U.S. at 721 ("essential and fundamental requirement for * * * [a] fair trial"). See *Jackson* v. *Denno*, 378 U.S. at 376-391.

[27] *Berger* v. *California*, 393 U.S. at 315.

[28] *Jackson* v. *Denno*, 378 U.S. at 378; see *id.* at 411-423 (Appendix A to opinion of Black, J., dissenting in part and concurring in part). *Bruton* v. *United States* overruled the decision of this Court in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957). But *"Delli Paoli* [was] under attack from its inception and many courts * * * in fact rejected it." *Roberts* v. *Russell*, 392 U.S. at 295; see also *Bruton* v. *United States*, 391 U.S. at 128-135 & nn.4, 8, 10.

[29] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), applied retroactively in *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963); *Berry* v. *City of Cincinnati*, 414 U.S. 29 (1973) (holding *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), retroactive).

but also at the pleading[30] and sentencing stages.[31] It hardly needs to be said that the right "relates to 'the very integrity of the fact-finding process.'"[32] And this Court's incorporation of it in the Fourteenth Amendment rested on the recognition that it is " 'implicit in the concept of ordered liberty.' "[33] It is true that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), overruled a directly contrary decision in *Betts* v. *Brady*, 316 U.S. 455 (1942). But that is hardly tantamount to an indication that the rule announced in *Gideon* was "novel" in the sense relevant here, for as *Gideon* noted, "*Betts* was 'an anachronism when handed down' " (372 U.S. at 345).[34]

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[30] *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968) (holding *White* v. *Maryland*, 373 U.S. 59 (1963), retroactive).

[31] *McConnell* v. *Rhay*, 393 U.S. 2 (1968) (holding *Mempa* v. *Rhay*, 389 U.S. 128 (1967), retroactive).

[32] *McConnell* v. *Rhay*, 393 U.S. at 3 (quoting *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965)).

[33] *Gideon* v. *Wainwright*, 372 U.S. at 342 (quoting *Palko* v. *Connecticut*, 302 U.S. at 325).

[34] See also *Argersinger* v. *Hamlin*, 407 U.S. at 27 n.1 (noting that 31 states already provided counsel to defendants charged with crimes less serious than felonies).

We note that deprivation of the right to counsel at trial, though it would not have presented a novel issue even in pre-*Gideon* cases, satisfies the "cause" prong of the cause-and-prejudice rule for a different, and obvious, reason: it makes little sense to hold an unrepresented defendant bound by procedural default rules designed with lawyers in mind. See *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971) ("the right to be furnished counsel does not depend on a request").

One other right which this Court has held fully retroactive, but which fits none of the classes mentioned above, is the equal protection guarantee of a right to appeal, including the provision of a free transcript where that is a necessary condition to appeal. *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958) (holding *Griffin* v. *Illinois*, 351 U.S. 12 (1956), retroactive). That is obviously something that goes to the integrity of the guilt-determination process, which is otherwise insulated from appellate scrutiny. See *Linkletter* v. *Walker*, 381 U.S. at 639 n.20. Moreover,

B. A Conviction Should Not Be Overturned On Collateral Attack On The Basis Of A Claim That Was Novel At The Time Of Trial

The procedural rights this Court has made fully retroactive have not always been clearly foreshadowed since the time the Constitution was adopted. Compare *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), with *Logan* v. *United States*, 144 U.S. 263, 298 (1892). But a demonstration to that effect is unnecessary, since the issue is only whether a claim has been "perceived and litigated" (*Engle* v. *Isaac*, 456 U.S. at 134) as recently as the earliest conviction still subject to collateral attack. We have argued above that that standard will almost always be satisfied in cases involving the various rights this Court has held fully retroactive.

There are, nevertheless, two further aspects of the issue which strongly suggest that an inquiry into the novelty of constitutional claims is not even worth undertaking. The first is that such an inquiry is both very time-consuming and standardless. The second is that its outcome may be irrelevant, since it is difficult to see how a conviction can be "fundamentally unfair" (*Engle* v. *Isaac*, 456 U.S. at 131) for reasons so novel that the defendant could not have perceived them at trial or on appeal.

1. As the survey we present above (pages 9-12) indicates, determining when a particular claim may last have been considered novel can be an enormously time-consuming venture. The kind of evidence we have presented—though quite sufficient for purposes of resolving the question here—is only a fragment of the materials one might have to canvas for years earlier than 1969, or for rights less frequently litigated than the burden of proving self-defense and malice. Relevant sources would include not only judicial decisions directly in point, but

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the practice required by *Griffin* was one already followed in many states. *Griffin* v. *Illinois*, 351 U.S. at 19.

also statutory materials from all the states, views of commentators, and judicial and legislative determinations of questions sufficiently analogous to afford "the tools to construct [the] constitutional claim." *Engle* v. *Isaac*, 456 U.S. at 133.

Moreover, even after all the relevant materials are collected, it is still necessary to measure the novelty of a claim at any given date against a standard that may be quite indefinite. The only certain standard would be to say that a claim is no longer novel once it has been "perceived and litigated" (*Engle* v. *Isaac*, 456 U.S. at 134) in any reported case. If more widespread ferment is demanded, it will be difficult to devise a verbal formula expressing the required quantum of precedent, and impossible to assure that the minimum is consistently applied to the various rights made fully retroactive. The best that can be hoped for is that this Court will eventually choose (for each right held fully retroactive) a certain year before which such claims would have been considered novel. Claimants convicted prior to that year would then be assumed to have "cause" for their procedural default, while those convicted later would not.

We hardly need say that an inquiry so complex and undefined affords only uncertain protection to the procedural default rules the "cause and prejudice" requirement is designed to serve. *Wainwright* v. *Sykes*, 433 U.S. at 86-91. An undertaking so unproductive from the point of view of the judicial system should not be launched unless there is good reason to believe it necessary in justice to the convicted defendants. We have argued (pages 18-23) that it is not, because the very notion of full retroactivity implies that a right is exceedingly unlikely to have been truly novel when any cases now on collateral review were tried. But even if that were not so, we would still see little point in deciding when a particular claim could last have been considered novel, as we now explain.

2. This Court noted in *Engle* v. *Isaac*, 456 U.S. at 131, that "later discovery of a constitutional defect unknown

at the time of trial does not invariably render the original trial fundamentally unfair." The relation between the fairness of a conviction and later-discovered rights is generally accommodated by the principles of retroactivity.[35] Even in the case of rights held fully retroactive, however, "[t]he failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the * * * proceedings." *Rose* v. *Lundy*, 455 U.S. 509, 547 n.17 (1982) (Stevens, J., dissenting). This indication is no less reliable—indeed it becomes compelling—when the reason for counsel's failure to object is not that he has overlooked a visible flaw, but that he, the defendant, the prosecution, and every court and legislature in the country view the practice later held defective as in fact constitutionally proper. Any theory that would equate novelty with cause justifying a procedural default must, in the end, explain why such a trial—universally viewed as fair at the time—should be conducted anew.[36]

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[35] Those rights essential to the fairness of a conviction are made fully retroactive. Those that are not essential are not. Compare the cases cited at pages 20-23, *supra*, with *United States* v. *Peltier*, 422 U.S. 531 (1975) (Fourth Amendment rule of *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), not to be applied retroactively); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975) (fair-cross-section rule for petit juries announced in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), not to be applied retroactively); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) (guidelines for custodial interrogation established in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), not to be applied retroactively); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966) (rule forbidding adverse comment on defendant's failure to testify, announced in *Griffin* v. *California*, 380 U.S. 609 (1965), not to be applied retroactively); *Linkletter* v. *Walker*, *supra*, (exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), not to be applied retroactively).

[36] Such a theory would also have to take account of the countervailing considerations that weigh against a new trial. As Judge Friendly has pointed out:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial when-

Nor is that the only conundrum posed by equating novelty with cause. Our adversary system assumes, and quite properly, that a defendant is bound by the tactical decisions made by his counsel. That principle affords a convincing reason why collateral attack is precluded by the failure to make a timely objection *after* a new procedural right is recognized. Yet the rule of novelty accepted by the court of appeals has the ironic consequence of allowing collateral review to one whose conviction was considered fair by contemporary standards, yet denying it to one (later convicted) whose conviction violated contemporary standards, though neither objected at trial or on direct review.

It would be odd to assert that such a difference in treatment is required in the name of fairness. And the irony is intensified by several other considerations. For example, Fed. R. Crim. P. 33 provides that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * *." Newly discovered evidence will often be more suggestive of innocence than faulty procedures, later found to affect the accuracy of fact-finding. Yet the Rules show a greater willingness to reopen more recent, rather than more ancient, trials. Their approach

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ever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" [*Sunal* v. *Large*,] 332 U.S. at 182 * * *, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws.

United States v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963).

rests on an awareness that after a certain time retrial becomes practically impossible, and on a judgment that the slight chance of finding a truly meritorious claim does not justify perpetual reexamination of final convictions. See Orfield, *New Trial in Federal Criminal Cases*, 2 Vill. L. Rev. 293, 299-304 (1957). Those considerations are equally relevant here.

Indeed, there may be even less reason to reopen convictions in cases like this than there is where the evidence is false or incomplete. There is, after all, an anachronism about picking out a particular procedure subsequently abandoned, and asserting that its use tainted prior convictions. That ignores the fact that the legal process as a whole may also have changed in a number of other ways, some of them offsetting. For example, although the burden of disproving self-defense may now be imposed on the prosecution, the substantive law of self-defense may also have changed in ways less favorable to the defendant. See *Perkins on Criminal Law* 1009-1012 (2d ed. 1969). At the same time, a state may have adopted a rule permitting conviction by a nonunanimous jury, see *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), thereby cancelling some of the defendant's advantage from a shift in the burden of proof.

As we made clear above (pages 18-23), we do not believe that any of the various rights this Court has made fully retroactive were in fact novel at the time of any conviction still open to collateral attack. But if we are mistaken in that belief we think, for the reasons just reviewed, that an inquiry into novelty is nevertheless unwarranted. As this Court stated in *Hankerson* v. *North Carolina*, 432 U.S. at 244 n.8, "The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." And this should be true even "[i]f the validity of * * * burden-shifting presumptions were as well settled * * * as [North Carolina] asserts[.]"

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

Those states imposing on the prosecution the burden of persuasion on the issue of malice include:

Arizona

State v. *Schroeder*, 95 Ariz. 255, 389 P.2d 255, cert. denied, 379 U.S. 939 (1964)

California

Jackson v. *Superior Court*, 62 Cal. 2d 521, 399 P.2d 374, 42 Cal. Rptr. 838 (1965)

Colorado

Leonard v. *People*, 149 Colo. 360, 369 P.2d 54 (1962)

Florida

Bolin v. *State*, 297 So. 2d 317 (Fla. App. 1974) (citing long-settled law)

Idaho

State v. *Jurko*, 42 Idaho 319, 245 P. 685 (1926)

Illinois

People v. *Warren*, 33 Ill.2d 168, 210 N.E.2d 507 (1965)

Indiana

King v. *State*, 249 Ind. 699, 234 N.E.2d 465 (1968) (settled law)

Iowa

State v. *Haffa*, 246 Iowa 1275, 71 N.W.2d 35, cert. denied, 350 U.S. 914 (1955)

Louisiana

State v. *Carter*, 227 La. 820, 80 So. 2d 420 (1955)

Nebraska

Haswell v. *State*, 167 Neb. 169, 92 N.W.2d 161 (1958)

Nevada

White v. *State*, 82 Nev. 304, 417 P.2d 592 (1966)

New Jersey
State v. *Gardner*, 51 N.J. 444, 242 A.2d 1 (1968)

New York
People v. *Sandgren*, 302 N.Y. 331, 98 N.E.2d 460 (1951)

North Dakota
State v. *Hoerner*, 55 N.D. 761, 215 N.W. 277 (1927)

Oklahoma
Thompson v. *State*, 365 P.2d 834 (Okla. Crim. 1961)

Oregon
Goodall v. *State*, 1 Or. 333 (1861)

Pennsylvania
Commonwealth v. *O'Neal*, 441 Pa. 17, 271 A.2d 497 (1970) (noting that state law since 1961 has imposed production burden only)

South Dakota
State v. *Reddington*, 80 S.D. 390, 125 N.W.2d 58 (1963)

Virginia
Johnson v. *Commonwealth*, 188 Va. 848, 51 S.E.2d 152 (1949).

APPENDIX B

Those states agreeing with North Carolina that the defendant bears the burden of persuasion concerning absence of malice include:

Arkansas

Bosnick v. *State*, 248 Ark. 1289, 455 S.W.2d 688 (1970) (approving statutory burden on defendant)

Georgia

Holmes v. *State*, 224 Ga. 553, 163 S.E.2d 803 (1968)

Hawaii

State v. *Cuevas*, 53 Hawaii 110, 488 P.2d 322 (1971) (invalidating, on basis of *Winship*, state statute permitting such a burden of proof)

Kentucky

Wheeler v. *Commonwealth*, 472 S.W.2d 254 (Ky. 1971)

Ohio

State v. *Callihan*, 11 Ohio App. 2d 23, 227 N.E.2d 654 (1967)

Tennessee

Thomas v. *State*, 210 Tenn. 297, 358 S.W.2d 315 (1962)

Texas

Bussey v. *State*, 147 Tex. Crim. 447, 181 S.W.2d 94 (1944)

Washington

State v. *Mays*, 65 Wash. 2d 58, 395 P.2d 758 (1964); see *State* v. *Kroll*, 87 Wash. 2d 829, 558 P.2d 173, 181-182 (1976) (overruling, on basis of *Mullaney*, practice of putting burden of mitigation on defendant).

APPENDIX C

Those states imposing on the prosecution the burden of persuasion on the issue of self-defense include:

Alabama

Pounders v. *State*, 282 Ala. 551, 213 So. 2d 394, 395 1968)

Alaska

De Groot v. *United States*, 78 F.2d 244 (9th Cir. 1935); see also *Toomey* v. *State*, 581 P.2d 1124 (Alaska 1978)

Arizona

State v. *Schroeder*, 95 Ariz. 255, 389 P.2d 255, cert. denied, 379 U.S. 939 (1964)

California

People v. *Cornett*, 33 Cal. 2d 33, 198 P.2d 877 (1948)

Colorado

Leonard v. *People*, 149 Colo. 360, 369 P.2d 54 (1962)

Florida

Bolin v. *State*, 297 So. 2d 317, 318-319 (Fla. App. 1974) (citing settled law)

Illinois

People v. *Warren*, 33 Ill. 2d 168, 210 N.E.2d 507 (1965)

Indiana

King v. *State*, 249 Ind. 699, 234 N.E.2d 465, 468 (1968) (settled law)

Iowa

State v. *Badgett*, 167 N.W.2d 680 (Iowa 1969)

Louisiana
State v. *Carter*, 227 La. 820, 80 So. 2d 420 (1955)

Michigan
People v. *Hartwick*, 8 Mich. App. 193, 154 N.W.2d 24, 26 (1967) (settled law)

Minnesota
State v. *Quinn*, 186 Minn. 242, 243 N.W. 70 (1932)

Mississippi
Turner v. *State*, 220 So. 2d 295, 298 (Miss.), cert. denied, 396 U.S. 834 (1969) (citing settled law)

Missouri
State v. *Holt*, 434 S.W.2d 576, 579 (Mo. 1968); *State* v. *Davis*, 342 Mo. 594, 116 S.W.2d 110, 112 (1938)

Montana
State v. *Powell*, 54 Mont. 217, 169 P. 46 (1917)

Nebraska
Gravely v. *State*, 38 Neb. 871, 57 N.W. 751 (1894)

New Jersey
State v. *Gardner*, 51 N.J. 444, 242 A.2d 1, 6 (1968)

New Mexico
State v. *Cochran*, 78 N.M. 292, 430 P.2d 863 (1967)

North Dakota
State v. *Hoerner*, 55 N.D. 761, 215 N.W. 277 (1927)

Oklahoma
Edwards v. *State*, 58 Okla. Crim. 15, 48 P.2d 1087 (1935); *Cottrell* v. *State*, 458 P.2d 328 (Okla. Crim. 1969)

South Dakota
State v. *Wilcox*, 48 S.D. 289, 204 N.W. 369 (1925); *State* v. *Reddington*, 80 S.D. 390, 125 N.W.2d 58 (1963)

Vermont

State v. *Barrett*, 128 Vt. 462, 266 A.2d 441, 443 (1970); *State* v. *Wilson*, 113 Vt. 524, 527, 37 A.2d 400 (1944)

Virginia

Jones v. *Commonwealth*, 187 Va. 133, 45 S.E.2d 908 (1948)

APPENDIX D

Those states requiring the defendant to raise a reasonable doubt on the issue of self-defense include:

Arkansas

Mode v. *State*, 231 Ark. 477, 330 S.W.2d 88 (1959)

Idaho

State v. *Lundhigh*, 30 Idaho 365, 164 P. 690 (1917)

Nevada

State v. *Skinner*, 32 Nev. 70, 104 P. 223 (1909)

Oregon

State v. *Jarvi*, 3 Or. App. 391, 474 P.2d 363 (1970) (citing 1920 precedent)

Washington

State v. *Turpin*, 158 Wash. 103, 290 P. 824 (1930)

APPENDIX E

Those states agreeing with North Carolina that the defendant bears the burden of persuasion on the issue of self-defense include:

Delaware

State v. *Winsett*, 205 A.2d 510 (Del. 1964) (by preponderance)

Georgia

Henderson v. *State*, 234 Ga. 827, 218 S.E.2d 612, 617 (1975) (relying on *Mullaney* to overrule state practice of placing burden on defendant to prove defense to satisfaction of jury)

Kentucky

Harvey v. *Commonwealth*, 318 S.W.2d 868 (Ky. 1958); *Wheeler* v. *Commonwealth*, 472 S.W.2d 254, 256 (Ky. 1971) (by convincing evidence)

Maryland

Evans v. *State*, 28 Md. App. 640, 349 A.2d 300 (1975) (following *Mullaney* in overruling state rule requiring defendant to prove self-defense by preponderance of evidence), aff'd, 278 Md. 197, 362 A.2d 629 (1976)

Ohio

State v. *Reid*, 3 Ohio App. 2d 215, 210 N.E.2d 142 (1965); *State* v. *Callihan*, 11 Ohio App. 2d 23, 227 N.E.2d 654 (1967) (preponderance of evidence)

Pennsylvania

Commonwealth v. *Commander*, 436 Pa. 532, 260 A.2d 773, 778 (1970) (citing established requirement of proof by preponderance of evidence)

Rhode Island

State v. *Mellow*, 107 A. 871 (R.I. 1919) (preponderance of evidence)

South Carolina

State v. *Richburg*, 250 S.C. 451, 158 S.E.2d 769, 772 (1968), appeal after remand, 253 S.C. 458, 171 S.E. 2d 592 (1969), cert. denied, 399 U.S. 930 (1970) (by greater weight of evidence)

Tennessee

Nance v. *State*, 210 Tenn. 328, 358 S.W.2d 327 (1962); *Keith* v. *State*, 218 Tenn. 395, 403 S.W.2d 758 (1966) (no standard)

Texas

Escamilla v. *State*, 464 S.W.2d 840, 841 (Crim. App. 1971) (no standard)

West Virginia

State v. *Harlow*, 137 W.Va. 251, 71 S.E.2d 330 (1952) (by preponderance of evidence)

APPENDIX F

Federal cases treating the standard and allocation of proof as constitutional requirements include:

Government of Virgin Islands v. *Lake*, 362 F.2d 770, 774 (3d Cir. 1966) (presumption of innocence and requirement that prosecution prove guilt beyond a reasonable doubt are elements of due process)

Government of Virgin Islands v. *Torres*, 161 F. Supp. 699, 700 (D.V.I. 1958) (same)

United States v. *Johnson*, 476 F.2d 1251, 1255 (5th Cir.), cert. denied, 414 U.S. 852 (1973) (citing pre-*Winship* law for proposition that prosecution's requirement to prove every element of offense beyond a reasonable doubt is an "obvious rudiment of due process")

Chromiak v. *Field*, 406 F.2d 502, 504 (9th Cir.), cert. denied, 395 U.S. 1017 (1969) (recognizing that shifting burden of proof to defendant on elements of offense would violate due process)

Reynolds v. *United States*, 238 F.2d 460, 463 (9th Cir. 1956) (observing that the presumption of innocence rests on fundamental concepts)

Yates v. *United States*, 316 F.2d 718, 725 (10th Cir. 1963) (treating presumption of innocence and burden of proof as elements of due process)

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No. 83-218-CFX
Status: GRANTED

Docketed:
July 29, 1983

Title: Amos Reed, etc. and the Attorney General of North Carolina, Petitioners
v.
Daniel Ross

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: League, Richard N.

Counsel for respondent: Nakell, Barry

Entry	Date	Note	Proceedings and Orders
1	Jul 29 1983	G	Petition for writ of certiorari filed.
2	Sep 14 1983		DISTRIBUTED. October 7, 1983
3	Sep 29 1983	F	Response requested.
4	Oct 31 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Oct 31 1983		Brief of respondent Daniel Ross in opposition filed.
6	Nov 2 1983		REDISTRIBUTED. November 23, 1983
8	Nov 28 1983		REDISTRIBUTED. December 2, 1983
9	Dec 5 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Dec 5 1983		Petition GRANTED.
			**********
11	Dec 16 1983	G	Motion of respondent for appointment of counsel filed.
12	Dec 23 1983		Record filed.
13	Dec 23 1983		Certified original record & C. A. proceedings, three volumes, received.
14	Jan 9 1984		Motion for appointment of counsel GRANTED and it is ordered that Barry Nakell, Esquire, of Boulder, Colorado, is appointed to serve as counsel for the respondent in this case.
15	Jan 19 1984		Order extending time to file petitioners' brief on the merits until January 28, 1984.
16	Jan 28 1984		Brief of petitioners Amos Reed, etc., et al. filed.
17	Jan 28 1984		Joint appendix filed.
18	Jan 28 1984		Brief amicus curiae of United States filed.
19	Feb 6 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Feb 14 1984		SET FOR ARGUMENT. Tuesday, March 27, 1984. (4th case)
21	Feb 21 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Feb 23 1984		Brief of respondent Daniel Ross filed.
23	Mar 27 1984		ARGUED.